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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, ET AL., APPELLANTS,

vs.

THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW
YORK

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[fol. 1] STATEMENT UNDER RULE 234 OMITTED

[fol. 2]

**SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS**

ABRAHAM LEDERMAN as President of TEACHERS UNION OF THE CITY OF NEW YORK, Local 555 of the United Public Workers, IRVING ADLER, JACK BIGEL, JONAH E. CAPLAN, SYLVIA LOMBCK, EVELYN DREYFUS, KATE FEINBERG, GEORGE FRIEDLANDER, MARK FRIEDLANDER, EWART GUINIER, MARGARET HUDSON, EDITH JOELL, C. E. JOHANSEN, SYLVIA KAPLAN, JOSEPH KEHOE, HAROLD KING, SAMUEL KRIEGER, ABRAHAM LEDERMAN, PAULINE LEVINE, DAVID LIVINGSTON, HENRIETTA LOWENSTEIN, JACK MARSHALL, SEVERINA MARTINEZ, WILLIAM MICHAELSON, WILLIAM NEWMAN, PEARL PACHODA, ALBERT PEZZATI, MADELINE PROVINZANO, LEONORA S. RATNER, DOROTHY RUBEIRO, MURIEL SCHLOSSBERG, EMMA SCHWEPPE, ALEX SIROTA, MARTA SPENCER, DOROTHY TATE, DAVE TIGER, EDITH TIGER, ALCOTT TYLER, CELIA LEWIS ZITRON, in behalf of themselves and others similarly situated, Plaintiffs,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant

NOTICE OF APPEAL TO THE APPELLATE DIVISION

Sirs:

Please take notice that the defendant hereby appeals to the Appellate Division of the Supreme Court, Second Department, from the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949, wherein it is, among other things, adjudged that the Feinberg Law is null, void and unconstitutional and the defendant appeals from each and every part of said judgment as well as from the whole thereof except so much of said judgment as dismisses the complaint as to all plaintiffs except Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel

Krieger, William Newman, Dave Tiger and Edith Tiger.

Dated: January 9, 1950.

Yours etc., John P. McGrath, Corporation Counsel,
Attorney for Defendant, Office & P. O. Address,
Municipal Building, Borough of Manhattan, City
of New York.

To: Pressman, Witt & Cammer, Esqs., Attorneys for
Plaintiffs, 9 East 40 Street, New York City; Francis J. Sinnott Esq., Clerk of the County of Kings.

[fol. 4] IN SUPREME COURT OF NEW YORK

JUDGMENT APPEALED FROM—December 16, 1949

An order having been granted simultaneously herewith awarding judgment to the taxpayer plaintiffs named therein declaring that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law, and that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949 pursuant to the Feinberg Law are null, void, and unconstitutional and enjoining and restraining the defendant, The Board of Education of the City of New York, from enforcing any of such provisions and from taking any action thereunder, and dismissing the complaint as to the other plaintiffs,

Now, on motion of Pressman, Witt & Cammer, attorneys for plaintiffs, it is

Adjudged and Decreed that the complaint be and the same hereby is dismissed as to all plaintiffs except Irving Adler, George Friedlander, Mark Friedlander, Marta [fol. 5] Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, hereby designated as plaintiffs, and it is further

Adjudged and Decreed that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law and that section 254 of chapter XV-B

of the Rules of the Board of Regents adopted July 5, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and it is further

Adjudged and Decreed that the Board of Education of the City of New York be and the same hereby is enjoined and restrained from enforcing any of the provisions of subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, or any of the provisions of subdivision 2 of section 3022 of the education law, added by the Feinberg Law, or any of the provisions of section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949.

Enter, M. H., J. S. C.

Granted Dec. 16, 1949, Francis J. Sinnott, Clerk.
Filed Dec. 21, 1949.

[fol. 6] IN SUPREME COURT OF NEW YORK

ORDER GRANTING JUDGMENT—December 16, 1949

[Title Omitted]

The plaintiffs having moved for an order granting judgment on the pleadings in favor of plaintiffs and against the defendant for the relief demanded in the complaint on the ground that the answer fails to set forth a sufficient defense and said motion having regularly come on to be heard, and Pressman, Wiff & Cammer, attorneys for plaintiffs, having appeared in support of said motion, and John P. McGrath, Corporation Counsel (Michael A. Castaldi, Assistant Corporation Counsel, of counsel), attorney for defendant, having appeared in opposition thereto, and after due deliberation,

[fol. 7] Now, on reading and filing the complaint verified September 9, 1949, the answer verified October 11, 1949, the notice of motion dated October 21, 1949, and upon filing the opinion of the Court dated December 14, 1949, it is

Ordered that said motion be and the same hereby is granted as to plaintiffs Irving Adler, George Friedlander,

Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, herein called the taxpayer plaintiffs, and it is further

Ordered that the motion is denied as to the other plaintiffs and as to such other plaintiffs, the complaint be and the same hereby is dismissed, and it is further

Ordered that the above-named taxpayer plaintiffs have judgment upon the pleadings that subdivision c of section 12a of the civil service law, as implemented by chapter 360, laws of 1949, known as the Feinberg Law, and that subdivision 2 of section 3022 of the education law, added by the Feinberg Law and that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law, be declared null, void and unconstitutional and that The Board of Education of the City of New York be permanently enjoined from enforcing any of such provisions and from taking any action thereunder.

Enter, M. H., J. S. C.

Granted Dec. 16, 1949, Francis J. Sinnott, Clerk.

[fol. 8] SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

Sirs:

Please take notice upon the complaint, verified September 9, 1949, and the answer verified October 11, 1949 herein, the plaintiffs will move this Court at a Special Term, Part 1 thereof, to be held in and for the County of Kings, at the courthouse in the Municipal Building, Fulton and Joralemon Streets, Borough of Brooklyn, City of New York, on the 28th day of October 1949 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting judgment on the pleadings in favor of the plaintiffs and against the defendant for the relief demanded in the complaint herein on the ground that the answer fails to set forth a sufficient de-

fense, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., October 21, 1949.

Yours, etc., Pressman, Witt & Cammer, Attorneys
for Plaintiffs, 9 East 40th Street, New York, New
York.

[fol. 9] To: John P. McGrath, Corporation Counsel, At-
torney for Defendant, Municipal Building, New York, New
York.

SUPREME COURT OF NEW YORK

COMPLAINT

Plaintiffs, complaining of defendant, by Pressman, Witt & Cammer, their attorneys, respectfully allege:

I. Teachers Union of the City of New York, Local 555 of the United Public Workers, is a voluntary labor organization of teachers employed in public and private schools in and about the City of New York, and Abraham Lederman is the President thereof. The purposes for which the Union is organized are (1) to increase educational opportunities for the people of New York, (2) to protect and advance the interests of educational employees in public and private institutions, (3) to develop the democratic character of education, and (4) to give teachers as a body a more effective voice in public affairs. The Union sues in behalf of itself and of its members.

[fol. 10] II. Plaintiff Abraham Lederman is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of Mathematics at Junior High School 64, Manhattan; plaintiff Emma Schweppe is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to Hunter College High School; Harold King is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools

of the City of New York, being now assigned at Textile High School; plaintiff Leonora S. Ratner is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of French, at Mark Twain Junior High School; Celia Lewis Zitron is a citizen of the United States and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now assigned to the Department of Latin at Washington Irving High School. Each of such plaintiffs has tenure in the public school system within the meaning of the education law of the City of New York:

III. Plaintiff Irving Adler is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand (\$1,000.) Dollars located at 36-12 Corporal Kennedy Drive, Bayside, Queens, New York, and is and for several years last past [fol. 11] has been a regular teacher in the public schools of the City of New York, being now Chairman of the Mathematics Department of Textile High School; plaintiff George Friedlander is a citizen of the United States and of the State of New York and is a resident of the City of New York and is the co-owner with plaintiff Mark Friedlander and is liable to pay taxes on, realty assessed for more than One Thousand (\$1,000.) Dollars at 4303 Skillman Avenue, Long Island City, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now Chairman of the Speech Department of Washington Irving High School; plaintiff Mark Friedlander is a citizen of the United States and of the State of New York and is a resident of the City of New York and is the co-owner with plaintiff George Friedlander of, and is liable to pay taxes on, realty assessed for more than One Thousand (\$1,000.) Dollars at 4303 Skillman Avenue, Long Island City, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now a teacher in Manhattan High School of Aviation Trades; plaintiff Marta Spencer is a citizen of the United States and of the State of New York and is a

resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand (\$1,000.) Dollars located at 31-40 76th Street, Jackson Heights, Queens, New York, and is and for several years last past has been a regular teacher in the public schools of the City of New York, being now a teacher in P. S. 48, Queens, New York. Each of such plaintiffs has tenure in the public school system within the meaning of [fol. 12] the education law of the City of New York.

IV. Plaintiff Samuel Krieger is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand (\$1,000.) Dollars located at 96-18 72nd Avenue, Forest Hills, Queens, within the City of New York, and is a business man; plaintiff William Newnman is a citizen of the United States and of the State of New York and is a resident of the City of New York and owns and is liable to pay taxes on realty assessed for more than One Thousand (\$1,000.) Dollars located at 4422 Bedford Avenue, Brooklyn, within the City of New York, and is a business man.

V. Plaintiffs Dave Tiger and Edith Tiger are citizens of the United States and of the State of New York and are residents of the City of New York, and are co-owners and are liable to pay taxes on realty assessed for more than One Thousand (\$1,000.) Dollars located at 233 Exeter Street, Brooklyn, within the City of New York, and are the parents of a child attending the schools of the City of New York.

VI. Plaintiff Jack Marshall resides at 4329 Broadway, New York City, and is treasurer of the Parent-Teachers Association of P. S. 132 in Manhattan; plaintiff Jack Bigel is president of the New York District of United Public Workers of America; plaintiff Pauline Levine resides at 350 Madison Street, New York City, and is vice-president of the Parent-Teachers Association of P. S. 147 in Manhattan; [fol. 13] plaintiff Sylvia Dombeck resides at 3152 Brighton 6th Street, Brooklyn and is President of the Parent-Teachers Association of P. S. 253 in Brooklyn; plaintiff Kate Feinberg resides at 1511 Boston Road, Bronx, and is president of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Henrietta Lowenstein

resides at 1505 Boston Road, Bronx and is treasurer of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Sylvia Kaplan resides at 1685 Boston Road, Bronx, and is a delegate of United Parents Association of the Parent-Teachers Association of P. S. 61 in the Bronx; plaintiff Pearl Pachoda resides at 663 Crotona Park North, Bronx, and is president of the Parent-Teachers Association of P. S. 92 in the Bronx; plaintiff Evelyn Dreyfus resides at 616 East 158th Street, Bronx, and is president of the Parent-Teachers Association of P. S. 51 in the Bronx; plaintiff Dorothy Rubeiro resides at 1421 Prospect Avenue, Bronx, and is president of the Parent-Teachers Association of P. S. 54 in the Bronx; plaintiff Margaret Hudson resides at 1416 Prospect Avenue and is president of the Parent-Teachers Association of P. S. 40 in the Bronx; plaintiff Madeleine Provinzano resides at 201 Wadsworth Avenue and is recording secretary of the Parent-Teachers Association of P. S. 132 in Manhattan; plaintiff Edith Joell resides at 121 West 116th Street; plaintiff Muriel Schlossberg resides at 1121 Beach 24th Street, Far Rockaway, Queens. Each of said plaintiffs is the parent of a child or children attending the public schools of the City of New York and each of such plaintiffs is a citizen of the United States and of the State of New York and a resident of the City of New York.

[fol. 14] VII. Plaintiff Joseph Kehoe is secretary-treasurer of the American Communications Association; plaintiff Severina Martinez is regional director of the Food, Tobacco, Agricultural and Allied Workers of America; plaintiff Alcott Tyler is business manager of Local 121; plaintiff C. E. Johansen is the New York agent of the Marine, Cooks and Stewards Union; plaintiff Albert Pezzati is a member of the International Executive Board and the regional director of the International Union of Mine, Mill and Smelter Workers; plaintiff William Michaelson is president of Local 2 Department Store Union; plaintiff David Livingston is director of organization of the Wholesale and Warehouse Workers Union, Local 65; plaintiff Ewart Guinier is national secretary-treasurer of the United Public Workers of America; plaintiff Alex Sirota is president of District 3, United Furniture Workers of America and manager of Local 140 thereof; plaintiff Dorothy Tate

is a social worker; plaintiff Jonah E. Caplan is a rabbi and is president of the Long Island Division of the American Jewish Congress. Each of such plaintiffs is a citizen of the United States and of the State of New York and a resident of the City of New York.

VIII. Plaintiffs bring this action in behalf of themselves and others similarly situated.

IX. Defendant, The Board of Education of the City of New York, is the body corporate organized pursuant to the Education Law of the State of New York which is required to conduct and administer the public school system of the City of New York.

[fol. 15] X: The people of the State and City of New York have expended and continue to expend large sums of money for the establishment of a system of free public education whereby students shall receive education from competent and alert teachers who are free to teach their subjects to the best of their conscience, knowledge and ability without intimidation, without fear, and without interference with freedom of speech, press, assembly, self-association and other basic rights guaranteed against restraint or abridgment by the State and Federal Constitutions.

XI. The free public school system and civil service provisions of the Constitution of the State of New York contemplates as essentials thereof that there be full encouragement for free inquiry for teacher and student; that the sole relevant test of merit and fitness of the teacher be his professional performance and acts related to such performance; that the political, social, economic and religious views, opinions and associations of the teacher be his personal concern; and that the teacher be guaranteed tenure, with dismissal confined to specified causes and only after full hearings, opportunity for self-defense and judicial reviews to the end that the full benefit of the teacher's training and experience be utilized for the benefit of the schools.

XII. On March 31, 1949, the Governor of the State of New York approved Chapter 366, laws of 1949, being "an act to amend the education law, in relation to eliminating from the public schools, superintendents, teachers and employees, who are members of subversive organizations."

[fol. 16] and which is commonly known as the Feinberg Law.

XIII. The Feinberg Law purports to implement and to apply sections 12-a of the civil service law and 3021 of the education law as follows:

First, it contains a legislative finding and declaration of the alleged necessity therefor;

Second, by subdivision 1 thereof, it adds a new section 3022, to the education law to direct the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system by section 12-a of the civil service law and section 3021 of the education law;

Third, subdivision 2 thereof directs the Board of Regents, "after inquiry, and after such notice and hearing as may be appropriate, (to) make a listing of organizations which it finds to be subversive" within the meaning of said section 12-a; that this listing may be amended or revised from time to time; that in making its inquiry the board may utilize "any similar listings or designations" by federal authorities and request and receive from them supporting evidence and material; that it may provide that membership in an organization so listed "shall constitute prima facie evidence of disqualification for appointment to or retention in" employment in any office or position in the public schools.

Fourth, subdivision 3 or such section directs annual reports from the board to the legislature on the subject.

[fol. 17] XIV. On July 15, 1949, in pursuance of the provisions of the Feinberg Law, the Board of Regents adopted rules numbered XV-B entitled "Subversive Activities" (herein called the Rules) and has distributed the Rules with an accompanying memorandum by the Commissioner of Education on certain administrative phases thereof to the defendant and to other administrative agencies concerned with the public schools for their instruction and guidance. A copy of the Rules, the Commissioner's memo-

random, the provisions of the Feinberg Law and of section 12-a of the civil service law is annexed as Exhibit A.

XV. The Board of Regents has further announced that it will on September 15, 1949, promulgate and publish its list of proscribed "subversive" organizations. However, it has not served charges of subversiveness against any organization or conducted any hearings at which evidence has been taken or the rights of confrontation, cross-examination, to be represented by counsel, to be heard on any charges has been held or accorded, and upon information and belief, it does not intend between now and the promulgation and publication of such list to prefer such charges or to accord such a hearing to any organization which it intends thus to list.

XVI. The Board of Regents in promulgating and publishing such list of proscribed "subversive" organizations, without charges, notice or hearing as aforesaid, intends to convey to the defendant, to all present and prospective teachers and to the people of the State the knowledge that an authoritative determination, binding and conclusive [fol. 18] upon them, in accordance with lawful authority and in consonance with due process of law, with respect to the status, rights and character of such organization has been made.

XVII. Upon information and belief the defendant intends and threatens, and has taken steps immediately to effectuate the provisions of the Feinberg Law and of section 12-a of the civil service law as applied and supplemented by the Feinberg Law and in accordance with the Rules and accompanying memorandum of the Commissioner of Education and to allocate and expend public funds for that purpose. The defendant has assigned a committee for this purpose and intends and threatens to adopt and accept the listing of alleged proscribed "subversive" organizations to be published on September 15 as binding and conclusive not only as to it but as to all teachers and employees of the public schools, and to prospective teachers and others, and to put into effect the procedures for loyalty reports on teachers provided by the Rules, with the consequent spying, snooping, gossip-mongering and concomitant and inevitable fear, repression and demoralization among the teachers and other employees in the pub-

lie schools of the City which will thereby be entailed. The said imminent and threatened activities of the defendant and the expenditures and costs which they will entail are illegal as are set out hereafter.

XVIII. The Feinberg Law on its face and section 12-a of the civil service law as applied and supplemented by the Feinberg Law, subject all present employees of the Board of Education, including those plaintiffs who are teachers, [fol. 19] to various rules, regulations and procedures which are in violation of the rights, property and liberties guaranteed against abridgment by the Federal and State Constitutions, as more fully hereafter set out.

XIX. The Feinberg Law, on its face, and section 12-a of the civil service law as construed and applied by the Feinberg Law, subject all persons, including all of the plaintiffs, to various sanctions, disabilities and penalties in violation of rights, property and liberties guaranteed against abridgment by the Federal and State Constitutions, as more fully hereafter set forth.

XX. The Rules and the accompanying memorandum of the Commissioner of Education and the Feinberg Law as construed and applied by the Rules and accompanying memorandum subject all present employees of the Board of Education, including those plaintiffs who are teachers, to various rules, regulations and procedures which are in violation of the rights, property and liberties guaranteed against abridgment by the Federal and State constitutions, as more fully set forth hereafter.

XXI. The rules and the accompanying memorandum of the Commissioner of Education and the Feinberg Law as construed and applied by the Rules and the accompanying memorandum subject all persons, including all of the plaintiffs, to various sanctions, penalties and disabilities, in violation of rights, property and liberties guaranteed against abridgment by the federal and state constitutions, as more fully hereafter set forth.

[fol. 20] XXII. The Feinberg Law is void, illegal and unconstitutional on its face for the following reasons:

1. It imposes thought control and fascist-patterned conformity upon the people and suppresses freedom, liberty and independence in that it purports to confer

upon an agency of government the power to proscribe organizations to which the people may not belong, under pain of punishment, on the basis merely of the teaching and advocacy of political, social and economic ideas, views and opinions, in violation of the powers reserved to the people by Amendments IX and X of the Constitution of the United States and guaranteed against restraint or abridgment by Article I of the Constitution of the State of New York and Amendment I of the Constitution of the United States.

2. It purports to confer upon an executive agency of government the power to determine the nature, character, rights and status of an organization to which the people may not belong under penalty of punishment on the basis merely of the teaching and advocacy of political, social and economic ideas, views and opinions, in violation of the powers reserved to the people by Amendments IX and X of the Constitution of the United States and guaranteed against restraint or abridgment by Article I of the Constitution of the State of New York and Amendment I of the Constitution of the United States.

3. It purports to confer upon an executive agency of government the power to make a binding and conclusive determination concerning the nature, rights, character or status of an organization to which the people may not belong under penalty of punishment without due process of law in violation of Article I, section 1 of the Constitution of the State of New York and Amendment XIV of the Constitution of the United States.

4. It purports to confer upon an executive agency of government the power, under vague and indefinite standards which may be fixed by the enforcement officials, to determine the "subversiveness" of political, social and economic ideas, views, expressions, writings and opinions unrelated to acts or conduct, as well as the "subversive" character of organizations to which the people may not belong under penalty of punishment and to prescribe orthodoxy in violation of Article I, section 1 of the Constitution of the State of

New York and Amendment XIV of the Constitution of the United States.

5. It is repugnant to Article I, section 10 of the Constitution of the United States, in that it constitutes a bill of attainder by making findings of fact and conclusions of law by legislative fiat against certain organizations as being "subversive" and therefore illegal.

XXIII. The Feinberg Law on its face (in addition to the reasons set forth in paragraph XXII) and section 12-a of the civil service law as applied and supplemented by the Feinberg Law are void, illegal and unconstitutional for the [fol. 22] following reasons:-

1. They impose a prior restraint upon and therefore abrogate the right of freedom of speech and press guaranteed against restraint or abridgment to the people of New York including plaintiffs by Article I, section 8, of the Constitution of the State of New York and by Amendments I and XIV to the Constitution of the United States in that they punish by disqualification from public employment expressions of a political, economic and social character defined by said Act and considered by the enforcement agents of said Act to be subversive.

2. They impose a prior restraint upon and therefore abrogate the right of freedom of assembly and association guaranteed against restraint or abridgment to the people of New York, including plaintiffs, by Article I, section 9, of the Constitution of the State of New York and by Amendments I and XIV to the Constitution of the United States in that they punish by disqualification from public employment mere assembly and association with organizations teaching and advocating expressions of a political, social and economic character defined thereby and considered by the enforcement agents of said Act to be subversive.

3. They deny to all the people of the State, including plaintiffs, due process of law in violation of Article I, section 1, of the Constitution of the State of New York and Amendment XIV to the Constitution of the United States in that they are vague and indefinite

and fail generally to specify with sufficient precision what illegal conduct will render persons liable to the penalties prescribed thereby.

4. They are repugnant to Amendments I and XIV of the Constitution of the United States because they subject the people of the State of New York, including plaintiffs, to loss of property, rights and liberties by the mere act of association with other persons or by membership in certain organizations or groups considered by the enforcement agencies to be subversive.

5. They violate Article V, section 6 of the Constitution of the State of New York by prescribing standards other than merit and fitness as a condition for public employment.

6. They violate Article V, section 6, of the Constitution of the State of New York by establishing subjective tests of merit and fitness as conditions of employment by teachers and prospective teachers.

7. They violate and restrict the inalienable right of the people reserved by Amendments IX and X to the Constitution of the United States to reform their government and to teach and advocate such reform.

8. They violate Article I, section 1 of the Constitution of the State of New York by destroying the system of free public schools prescribed thereby, and by imposing thought control and prescribing orthodoxy in thinking, expression, writing and association for [fol. 24] the people of the State of New York, and especially upon teachers, prospective teachers and children now and hereafter attending the schools, and by imposing a despotism of ideas, views and opinions.

XXIV. The Rules and the accompanying memorandum of the Commissioner of Education are void, illegal and unconstitutional for each of the reasons set forth in paragraphs XXII and XXIII and are in violation of Article I of the Constitution of the State of New York and Amendment XIV of the Constitution of the United States, and for the additional reasons that

1. They are ex post facto in operation and make punitive acts, conduct, ideas and associations which

were legal prior thereto and are retroactively rendered punitive.

2. They are designed to create a sham appearance of due process of law by the euphemistic provision "that in all cases all rights to a fair trial, representation by counsel and appeal or court review * * * shall be scrupulously observed", whereas in truth, fact and intent the Regents intend by the promulgation of the Rules and the Commissioner of Education intends by the promulgation of the accompanying memorandum to convey to the administrative officers and agencies to whom they are addressed, including the defendant, the knowledge that the Regents' determination of the subversiveness of an organization is authoritative, binding and conclusive as to defendant and other administrative officers and agencies to whom they are addressed, including the defendant, the knowledge [fol. 25] that the Regents' determination of the subversiveness of an organization is authoritative, binding and conclusive as to defendant and other administrative officers and agencies and upon all teachers and prospective teachers; that it has been made with lawful authority and in consonance with due process of law; and that such determination is and will be binding, when in fact this critical determination, concerning the status, rights and character of such organization under the Rules as well as under the Feinberg Law, may and will be made without due process, without notice of hearing, ex parte, without evidence, confrontation, benefit of counsel, cross-examination or any of the other fundamental and elemental essentials of due process of law.

3. They provide for a presumption of guilt rather than innocence and adopt and advance the doctrine of guilt by association.

4. They specify that ideas, expressions, views and associations, as distinguished from acts and conduct, are or may constitute subversive activity and are punishable.

5. They extend the statutory proscription against advocacy of force and violence to advocacy of any change in our government and limit the rights of

teachers to allow them only to raise questions and make suggestions about improvements in our form of government "outside their classrooms", and to "inform themselves fully, and enter into discussions with people, about forms of government different from our own."

[fol. 26] XXV. In the discharge of their duties of citizenship and in the exercise of their constitutional rights of freedom of speech, press, assembly and petition, and for the aid, protection, security, improvement and betterment of their status, the people, including plaintiffs, and particularly teachers, (1) have the right, subject to the competent and proper performance of their assigned duties and (2) have the obligation in order competently and properly to perform such duties, to espouse, advocate, teach and urge any and all political, social, and economic views, ideas, and opinions as their minds, conscience, training, experience and learning dictate so long as they engage in no unlawful acts.

XXVI. The enactment of the Feinberg Law and the promulgation by the Board of Regents of the Rules and by the Commissioner of Education of the accompanying memorandum demoralize the school system of the City, stifle academic freedom, discourage those who value independence from entering the teaching profession, invite a reign of intimidation and repression, impose upon teachers a frightened self-censorship on the discussion of the mildest form of social, political and economic reform and a resulting censorship upon the right of pupils and students freely to receive the benefit of diverse and controversial ideas, views and opinions, and, unless stamped as unconstitutional, void and illegal, threatens to leave the cruel imprint of bigotry, dictatorial thought control and single moldedness upon school children, destroying the possibility of free and untrammelled critical inquiry, intellectual curiosity and freedom without which education is barren and the schools mere buildings.

[fol. 27] XXVII. The threatened and imminent acts of defendant described above, based upon the Feinberg Law and the Rules and accompanying memorandum promulgated thereunder will intensify the injury resulting from

the enactment of the Feinberg Law described in paragraph XXVI and the promulgation of the Rules and accompanying memorandum and will cause further substantial waste of public funds, irreparable injury to the public schools of the City of New York and to the liberty and property of plaintiffs and such threatened and imminent acts are unconstitutional void and illegal.

XXVIII. The threatened and imminent acts of defendant described above, based upon the Feinberg Law and the Rules and accompanying memorandum promulgated thereunder will require supervisory employees of the defendant, including those of the plaintiffs who occupy supervisory positions in the public schools, to engage in unlawful extra-educational prying and inquiry into the political, social and economic views and associations of their subordinates for the assessment, appraisal and determination of the "subversiveness" thereof in order to comply with the at least annual reporting requirements of the Feinberg Law, the Rules and accompanying memorandum, and will involve substantial cost in time, supplies and material therefor and disruption and interference with the educational administrative duties of such employees and of the defendant, its officers and agents.

XXIX. The mere preferment of charges against any teacher under the Feinberg Law, including the plaintiff [fol. 28] teachers or any member of a Union, in the face of the denial under the prescribed rules and procedures, of any right or opportunity to defend on the critical issue of the character, status and right of an organization listed as subversive is tantamount to conviction and equivalent to criminal stigmatization and would result in disqualification from not only public, but from private employment as well, would result in social ostracism and economic isolation and would constitute irreparable injury and hardship to such teachers which would not be remediable by any action at law and will intensify the fear and repression generated by the enactment of the Feinberg Law with consequent further injury to the school system.

XXX. Plaintiffs, especially those who are teachers and prospective teachers, have and will have no administrative remedy since the defendant holds that it must and will

administer the Feinberg Law as written and as applied by the Rules and accompanying memorandum and, further, that the designation of any organization by the Regents is final and conclusive with respect to the status, character and right of such organization not only as to such organization but as to its members and all teachers and prospective teachers as well.

XXXI. Greater injury would be caused to plaintiffs by the denial of the relief here prayed for than would be caused to defendant by the granting thereof.

XXXII. Plaintiffs have no adequate remedy at law.

[fol. 29] Wherefore, plaintiffs demand judgment:

1. That the Feinberg Law on its face and as construed and applied by the Rules and accompanying memorandum be declared unconstitutional;
2. That section 12-a of the civil service law, as implemented and applied by the Feinberg Law be declared unconstitutional;
3. That the Rules and accompanying memorandum on their face be declared unconstitutional.
4. That defendant, its officers, members, attorneys and agents be enjoined from expending any funds or taking any action on the basis of or pursuant to the Feinberg Law, section 12-a as implemented and applied by the Feinberg Law, or the Rules or accompanying memorandum;
5. That pending the trial hereof a temporary restraining order issue to restrain any action or expenditure of funds by defendant on the basis of or pursuant to the Feinberg Law, section 12-a as implemented and applied by the Feinberg Law or the Rules or accompanying memorandum;
6. That plaintiffs have such other and further relief as may be just and proper.

Dated, New York, September 9, 1949.

Pressman, Witt & Cammer, Attorneys for Plaintiffs,
Office & P. O. Address, 9 East 40th Street, New
York 16, New York.

(Verified by Abraham Lederman on September 9, 1949.)

[fol. 30] EXHIBIT A, ANNEXED TO COMPLAINT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

REGENTS' RULES

ON

SUBVERSIVE ACTIVITIES

THE UNIVERSITY OF THE STATE OF NEW YORK

REGENTS OF THE UNIVERSITY

With years when terms expire

1957 William J. Wallin A.M., LL.D., *Chancellor*, Yonkers.

1952 John P. Myers A.B., D.Sc., *Vice Chancellor*, Plattsburg.

1951 Wm. Leland Thompson AB., LL.D., Troy.

1954 George Hopkins Bond Ph.M., LL.B., LL.D., Syracuse.

1953 W. Kingsland Macy A.B., LL.D., Islip.

1958 Edward R. Eastman LL.D., Freeville.

1960 Welles V. Moot A.B., LL.B., Buffalo.

1950 Mrs. Caroline Werner Gannett L.H.D., LL.D., Rochester.

1959 Roger W. Straus Litt.B., L.H.D., D.H.L., New York.

1955 George L. Hinman A.B., LL.B., Binghamton.

1961 Dominick F. Maurillo A.B., M.D., Brooklyn.

1956 John F. Brosnan A.M., LL.B., J.D., LL.D., New York.

1962 Jacob L. Moltzmann LL.B., LL.D., Brooklyn.

President of the University and Commissioner of Education

Francis T. Spaulding A.M., Ed.D., LL.D., Litt.D.
Deputy Commissioner

Lewis A. Wilson D.Sc., LL.D.

[fol. 31] *Associate Commissioner (Higher and Professional Education)*

Algo D. Henderson LL.B., M.B.A., LL.D.

Associate Commissioner (Institutes of Applied Arts and Sciences, Adult Education)

Lawrence L. Jarvie A.M., Ph.D.

Associate Commissioner (Elementary and Secondary Education)

Harry V. Gilson A.M., D.Sc. in Ed.

Counsel

Charles A. Brind Jr A.B., LL.B., LL.D.

Executive Assistant to the Commissioner

James E. Allen Jr Ed.M., Ed.D.

Chapter 360 of the Laws of 1949 requires the Board of Regents to "adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law." The sections of the law here cited define certain types of subversive activity, and make mandatory the dismissal of school officials, teachers, or other employees who engage in such activity.

This pamphlet sets forth the Rules adopted by the Regents on July 15, 1949, in accordance with the detailed provisions of the statute. It presents also a memorandum by the Commissioner of Education on certain administrative phases of the Rules, together with the full text of Chapter 360 of the Laws of 1949, Section 3021 of the Education Law, [fol. 32] and section 12-a of the Civil Service Law.

Inquiries with respect to the administration of the Regents' Rules should be addressed to the Commissioner of Education, State Education Department, Albany 1, New York.

RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

CHAPTER XV-B

SUBVERSIVE ACTIVITIES

SECTION 254 *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the afore-said statutory provisions, including the provisions with respect to membership in organizations listed by the Board [fol. 33] of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or

other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the [fol. 34] evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent

[fol. 35] to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed [fol. 36] under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or reten-

tion in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

5. This section shall take effect immediately.

[fol. 37] COMMISSIONER'S MEMORANDUM

ON

ADMINISTRATION OF REGENTS' RULES RELATING TO SUBVERSIVE ACTIVITIES

Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employees as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect simply of directing attention to a special supervisory need—namely, the need “to protect the children in our state from . . . subversive influence”—which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need.

The Rules established by the Regents in response to the direction of the Legislature are largely self-explanatory. The Rules provide systematic procedures for identifying and removing from the school system disloyal teachers or other employees.

On four major points certain supplementary comments may be appropriate. These points are (1) the responsibility of the officials designated by school authorities for reporting on teachers and other employees, (2) the types of conduct which may properly be considered by school authorities as subversive within the meaning of section 3021 of the Education Law and section 12-a of the Civil Service [fol. 38] Law, (3) the rights of a person accused of subversive activity to a hearing on charges, and (4) the list-

ing of organizations found by the Regents to be subversive within the meaning of the law.

1. *Reports by school officials.* The officials designated by school authorities to report on teachers and other employees will face a two-fold duty. It will be their responsibility, on the one hand, to help the school authorities rid the school system of persons who "use their office or position to advocate and teach subversive doctrines." On the other hand, it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive.

School authorities will need to select with great care the officials who are to be entrusted with this duty.* The officials chosen should be persons of wide acquaintance within the school system, sound judgment in matters of personal relationships, and sufficient maturity and professional experience to have won the respect of the other local officials, teachers and school employees and of the general public. Furthermore, these officials must be close enough to the work of the classroom teacher so that they will have a real understanding of the methods of presentation that [fol. 39] may make the difference between teaching which is subversive in intent and teaching which has neither a subversive purpose nor subversive results.

In preparing the reports which they are to render to the school authorities, the designated officials will of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence. In weighing such further evidence the officials should be guided by the considerations presented

* School authorities in districts employing fewer than eight teachers will ordinarily find it advantageous to designate one or more of their own number as the official or officials to make the required reports. When there is only a single trustee in such a district, he or she will presumably make all the reports required by the Regents' Rules.

in section 2 of this memorandum. Any evidence submitted to such officials which reflects adversely on a teacher, they are bound to examine promptly, dispassionately and thoroughly.

The designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection attention is called to the *Matter of Mencher v. Chesney*, 297 N. Y. 94 (101) in which the Court of Appeals stated: "The courts have held that a false charge that one is a Communist is basis for a libel action."

2. *Subversive activity.* The Education Law and the Civil Service Law make it entirely clear that a teacher [fol. 40] or other employe who "wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means," or who participates in the preparation, publication or distribution of written or printed matter advocating such a doctrine or advising its adoption, or who "organizes or helps to organize or becomes a member of any society or groups of persons" which teaches or advocates such a doctrine, or who utters "any treasonable or seditious word or words" or does "any treasonable or seditious act or acts," is engaging in subversive activity and is subject to dismissal. It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children.

It must be borne in mind that teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American

form of government and American institutions, which can not in any just sense be construed as subversive. Especially if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and for-
[fol. 41] eign governments (including the people and government of Russia), not for the purpose of advocating changes in our own government but for the purpose of acquainting their pupils with the kinds of government under which other people live.

Moreover, teachers who take full advantage of their own privileges as citizens may raise questions and make suggestions outside their classrooms, about improvements in our form of government. In addition, they may quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own.

School authorities and the officials designated in accordance with the Regents' Rules must be alert to guard such teachers against unjust accusation and condemnation. In particular, they should reject hearsay statements, or irresponsible and uncorroborated statements, about what a teacher has said or done, either in school or outside. They should examine an accused teacher's statement, writing or action in their context, and not in isolated fragments. They must insist on evidence, and not mere opinion, as a basis for any action which they may take.

But the statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.

[fol. 42] 3. *The preferring of charges.* Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record

must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal.

4. *List of subversive organizations.* The Regents have not as yet published a list of organizations which, in accordance with Chapter 360 of the Laws of 1947, they have found to be subversive in that the said organizations "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine." Due notice will be given to school authorities of the publication of the required list. Pending its publication, school authorities are responsible for proceeding with all diligence in the cases of teachers whose acts other than membership in specified organizations fall within the purview of the statute. [fol. 43] They are not responsible until the list is published, for proceeding against teachers on the ground that they belong to any specified organization.

In the reports required as of October 31st, school authorities will be expected to indicate the measures which they have put into effect prior, as well as subsequent, to the publication of the Regents' list.

Francis T. Spaulding, Commissioner of Education.

CHAPTER 360, LAWS OF 1949

SECTION 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employ-

ment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position [fol. 44] to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplors the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

[fol. 45] § 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine; as set forth in section twelve-a of the civil service law. Such [fol. 46] listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for ap-

pointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.

3023. Liability of a board of education, trustee or trustees.

[fol. 47] 3024. Teachers responsible for record books.

3025. Verification of school register.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college or any other state educational institution who: (a)

By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

[fol. 48] (b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

[fol. 49] SUPREME COURT OF NEW YORK

ANSWER

Defendant above named, answering the complaint herein, by John P. McGrath, Corporation Counsel, its attorney, alleges:

1. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation in

Paragraph I thereof except as to the allegation that "The Union sues in behalf of itself and of its members". As to such allegation, defendant denies that Teachers Union of the City of New York, Local 555 of the United Public Workers, has any right to institute or maintain this action.

2. Answering the allegations in Paragraphs II and III thereof, defendant denies that the plaintiffs therein named, to wit, Abraham Lederman, Emma Schweppe, Harold King, Leonora S. Ratner, Celia Lewis Zitron, Irving Adler, George Friedlander, Mark Friedlander and Marta Spencer have any right to institute or maintain this action.

3. Answering the allegations in Paragraphs IV or VII thereof, defendant denies that the 29 plaintiffs named in the said paragraphs have any right to institute or maintain this action.

[fol. 50] 4. Answering the allegations in Paragraph VIII thereof, defendant denies that the plaintiffs have any right to institute or maintain this action on behalf of themselves or in behalf of others similarly situated.

5. Denies each and every allegation in paragraph X and XI thereof and alleges that the defendant is a public corporation and a city school district with such powers and duties as are prescribed by the Constitution and statutes of this State and by the rules and regulations of the Board of Regents and of the Commissioner of Education.

6. Denies the allegations in paragraphs XIII and XIV thereof, and refers to L. 1949, ch. 360, to Article XV-B of the Rules of the Board of Regents and to the memorandum of the Commissioner of Education for the text and legal effect thereof.

7. Admits the first sentence in paragraph XV thereof and denies each and every allegation in the balance of the said paragraph.

8. Denies each and every allegation in Paragraph XVI thereof and alleges that L. 1949, ch. 360 provides that membership in any organization listed by the Board of Regents shall be *prima facie* evidence of disqualification for employment in the public schools of the State, and refers to L. 1949, ch. 360 for the text and legal effect thereof.

[fol. 51] 9. Denies each and every allegation in Paragraphs XVIII, XIX, XX, XXI, XXII, XXIII, XXIV,

XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXII thereof.

10. Admits the allegations in the first sentence of paragraph "XVII" thereof except the words "and to allocate and expend public funds for that purpose" and except as thus admitted, it denies each and every allegation in the said paragraph.

Wherefore, the defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

John P. McGrath, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by Morris Warschauer, Assistant Secretary of the Board of Education on October 11, 1949.)

[fol. 52] IN SUPREME COURT OF NEW YORK

OPINION OF HEARN, J.

(Vol. 122, New York Law Journal, Page 1653, December 15, 1949.)

HEARN, J.—This is an action for a permanent injunction and a judgment declaring unconstitutional chapter 360, Laws of 1949 (commonly known as the Feinberg Law) section 12-a of the Civil Service Law (as implemented by the Feinberg Law) and the Regents Rules and Commissioner's memorandum promulgated thereunder.

There are three motions before the court—one for a temporary injunction, another for leave to intervene as parties plaintiff and the third, by plaintiffs, for judgment on the pleadings. Since a decision on the third will dispose of all issues the court will consider it first.

The plaintiffs are a heterogeneous group. Among them are the Teachers Union, other unions, parents, parent-teacher associations, citizens, a social worker, the head of a religious group, teachers and taxpayers. The answer denies that any of them have the right to maintain this action.

There are ~~only~~ two groups of plaintiffs whose claim of a right to sue has substance—the teachers and the taxpayers.

As to the teachers, defendant says there is no justiciable controversy. No list has yet been promulgated by the Board of Regents—hence no teacher has been or can be accused of being a member of a listed subversive organization—in short, no one has been hurt. Plaintiff teachers, however, maintain that they are hurt by the very existence of the law on the books—that they are presently restrained in the exercise of their rights of free speech, free thought [fol. 53] and freedom of association because they fear the sanctions contained in the statute—and that “uncertainty, peril and insecurity result from imminent and immediate threats to asserted rights.” They say they should be allowed to sue now; that they should not have to wait until a list has been promulgated and then show that by membership in a listed subversive organization they are aggrieved.

Were this an open question the court would be inclined to agree with plaintiffs. If they must violate the law to gain the right to challenge it they risk inevitable discharge from their positions. “To require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadequate, if not wholly illusory, any legal remedy which they may have. Men who must sacrifice their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course is irreparable injury” (United Public Workers v. Mitchell, 330 U. S. 75, dissent by Douglas, J.).

Cogent as this argument may be, the court nevertheless is bound by the ruling of the majority in the above-cited case—and that ruling was that there is no justiciable controversy in a case such as this until the law has first been violated. Accordingly plaintiff teachers have no right to now maintain this action.

[fol. 54] The right of the taxpayer plaintiffs presents a different proposition. Section 51 of the General Municipal Law permits a taxpayer to sue to prevent “any illegal act * * * or waste or injury to * * * property, funds or estate

of " . . . a municipal corporation." Defendant comes within the scope of this section "in so far at least as to authorize an action by a taxpayer to prevent waste of the City's money" (Lewis v. Board of Education, 258 N. Y., 117).

The complaint, among other things, alleges that defendant intends and threatens "to allocate and expend public funds" to effectuate the Feinberg Law; that defendant's imminent acts will cause further substantial waste of public funds; and that enforcement of the Law "will involve substantial cost in time, supplies and material." The answer denies these allegations but admits that defendant intends and threatens and has taken steps immediately to effectuate the law.

The court need not ignore common sense and everyday experience in appraising the pleaded facts. It is self-evident—and defendant, in fact, does not dispute it—that under the law an elaborate system of investigation will be set up (see New York City Superintendent of Schools proposed order for enforcement of the Feinberg Law, New York Times, September 13, 1949). Moreover, should charges be preferred against any teachers extensive hearings necessarily will be held (see Regents' Rules on Subversive Activities, p. 12). The investigations and hearings will, of course, involve a liberal use of personnel time and consumption of material and supplies bought with public funds. It is worth noting in this connection that the Lusk Law (chap. 666 of the Law of 1921), which was similar in [vol. 55] many respects, carried with it an appropriation for the enforcement expenses of the State Department of Education. It is fair to assume that the enforcement of the law here under consideration likewise will require the expenditure of public funds.

In view of the foregoing the court holds that plaintiff taxpayers have the right to sue. In any event it being vitally important to the public at large and the school system in particular that the real issue herein be speedily determined the court should not "pause to consider whether the question is presented in appropriate proceedings" (Matter of Kuhn v. Curran, 294 N. Y., 207).

Since there are no issues of fact raised by the pleadings the motion for judgment will be considered on the substantive legal issue involved.

The problem posed by these statutes has many facets. Yet essentially they raise but one basic question—How far may the state go in imposing restrictions or conditions on employment as teachers in the public schools?

In seeking the answer to this question it should be borne in mind that to impart the principles of democracy, freedom of thought and speech must be preserved in the school setting. The atmosphere must be one which encourages able independent men to enter the teaching profession. To develop good citizens teachers must give students the facts, help them to learn to think and urge them to reach their own conclusions. To so teach, the teacher must himself be free to think and speak. He must not be under threat of enforced conformity to rigid standards; he must be free of blind censorship; he must be open-minded to new ideas—even when they do not appear to be orthodox. [fol. 56] The heart of American education is independent thought. This was best stated in the charge of Judge Medina in the recent trial of *United States v. Foster et al.*: "I charge you that if the defendants did no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas, you must acquit them. For example, it is not unlawful to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence by the prosecution such as the Communist Manifesto, Foundations of Leninism and so on. Of course these books are to be found in public libraries and in the libraries of American universities. Indeed, many of our most outstanding and sincere educators have expressed the view that these theories should be widely studied and thoughtfully considered, so that all may thoroughly appreciate their significance and the inevitable effects of putting such theories into practice."

We must also recognize that both state and teacher have dual characters. The state is both employer and government—the teacher both employee and citizen. Hence, the state, like any employer, may impose a condition on employment that bear a reasonable relationship to the duties to be performed (Constitution of State of New York, Art. V, sec. 6). Such condition may be valid even though it impinges upon the basic constitutional right of free speech if it is essential to the integrity of the public service and

if the infringement is limited to the necessities of the situation.

But unlike a private employer the state is restricted to a considerable extent both as to the nature of the condition [fol. 57] imposed and the manner of its imposition. Thus it may not bar one from public employment because of race, religion or political affiliation (*United Public Workers v. Mitchell*, 330 U. S., 75, 100). Nor may it bar one from public employment, even though the reason be sound, if the method employed constitutes conviction and punishment without a judicial trial (*United States v. Lovett*, 328 U. S., 303). No more may the state bar teachers from the schools for even a highly desirable and necessary reason if the method employed violates "due process."

It is particularly needful that we reaffirm and re-emphasize this doctrine at this stage in our history. In this connection it would be well to ponder a passage from *The Times of London*, written more than a hundred years ago. It appears in "Ordeal by Planning," by John Jewkes:

"The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity, and overbearing men tolerated with complacency, springs the tyrannical useage which generations of wise and good men may hereafter perceive and lament and resist in vain. At present, common minds no more see a crushing tyranny in a trivial unfairness or a ludicrous indignity, than the eye uninformed by reason can discern the oak in the acorn, or the utter desolation of winter in the first autumnal fall. Hence the necessity of denouncing with unwearied and even troublesome perseverance a single act of oppression. Let it alone and it stands on record. The country has allowed it and when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compulsion."

[fol. 58] The court well knows that at the present time there are those who would launch a widespread attack on our institutions through the outward appearance of democratic process. They proceed by stealth and in disguise to destroy that which they appear to defend. But "historic liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming in-

terest which appeals to the feelings and distorts the judgment' (Holmes, J., in *Northern Securities Co. v. United States*, 193 U. S., 197, 400), nor should they "change their form and content in response to the 'hydraulic pressure' (Holmes, J., *supra*) exerted by great causes."

There is yet another principle by which the court must be guided. A law which intrudes upon freedom of speech, thought or association comes into court bare of the usual presumption of validity because of "the preferred place given in our scheme" to these freedoms. And it is the character of the right, not of the limitation, which establishes what standard "shall be used in determining where the individual's freedom ends and the State's power begins" (*Thomas v. Collins*, 323 U. S., 516).

With these principles clearly in mind—cognizant always that every legal picture must have a moral frame—remembering that "the life of the law is not logic, but experience" (Oliver Wendell Holmes), let us examine the laws and rules here attacked.

It should be noted at the outset that the Feinberg Law is a new administrative statute implementing two older laws (Education Law 3021 and Civil Service Law 12-a). Its provisions merely establish procedures to facilitate enforcement of these two earlier statutes, they being substantive in nature.

Since its provisions refer to hearings and presumptions it may be well here to point out the rules relevant thereto.

Due process ordinarily requires "a fair and open hearing" with "not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan v. U. S.*, 304 U. S., 1, 19).

Presumptions may be created by statute only if there is "some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate" (*McFarland v. Am. Sugar Co.*, 241 U. S., 86).

What are these statutes and rules? What do they seek to accomplish? How do they operate?

The Feinberg Law provides, *inter alia*, that the Board of Regents shall promulgate a list of "subversive" organizations after inquiry and "such notice and hearing as may

be appropriate." The character and conduct of the hearing thus may be left to the unfettered discretion of the Regents. Under such provision it well may happen that an allegedly subversive organization, after appropriate notice to appear at a hearing, defaults and subsequently is listed by the Regents following an uncontested hearing. If it be assumed, as of course we may, that the Regents will properly enforce the law, such enforcement necessarily would be as follows: Adequate notice of a hearing is given to an organization; a full and proper hearing is had; but no member of the organization was in fact represented at the hearing [fol. 60] ing, such member not having been a party to the proceeding. After the hearing let us further assume that the organization is placed on the list of subversive organizations.

Should the organization or a member wish to challenge this listing it would seem that this could be done in a proceeding pursuant to article 78 of the Civil Practice Act. But in a comparable situation the courts have held that they will not review such administrative action because no justiciable controversy exists (*Joint Anti-Fascist Refugee Committee v. Clark*, 177 Fed., 2d, 79; *Internat. Workers Order v. Clark*, District Court for District of Columbia, McGuire, J., April 12, 1949; *Nat. Council for Soviet Am. Friendship v. Clark*, C. C. A., D. C., not yet reported). A teacher is then charged with membership in the listed organization. At such hearing the organization is deemed to be subversive within the definition of Civil Service Law 12-a even though the finding was by an administrative body and, as to the accused teacher, the supporting evidence was hearsay and he had no opportunity to meet it. In short—the listing, as to him, was *ex parte*.

Is there any reasonable connection under these circumstances between the fact supposedly "proved" and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the government eleven months to establish in the recent trial in the United States District Court (Southern District) between Judge Medina in the case of *United States v. Foster et al.*?

[fol. 61] But this presumption as to the character of the organization is not the only burden placed upon an accused teacher. The statute is ambiguous as to whether past as well as present membership is proscribed. Though the Regents' Rules interpret it as forbidding only present membership they create a presumption of continuance of past membership "in the absence of a showing that such membership has been terminated in *good faith*." This rule well may be invalid under a constitutional ban on ex post facto legislation (see *Calder v. Bull*, 3 Dall., 386). Aside from this, however, it clearly places upon an accused teacher the oppressive burden of showing his innocence through affirmative proof of something as nebulous and intangible as "good faith"—and this in the face of the inevitable and justifiable skepticism which any realistic hearing officer must have as to the "good faith" of one accused of membership in a subversive organization.

There are yet other inequities in the procedure. A teacher found guilty by the Board of Education has a right of appeal. Education Law 310 gives the right to appeal to the State Commissioner of Education. Education Law, section 2523, gives an alternative right of appeal to the courts in an article 78 proceeding. Civil Service Law 12-a(d) provides for appeal to the courts where disqualification is pursuant to section 12-a. These three sections apparently overlap, and, to some extent, conflict with each other. In the present state of the law there is, to say the least, serious doubt as to whether any one of them exclusively controls and, if so, which—or whether they provide alternate remedies (see *Matter of Nestler v. Board of Examiners*, 192 Misc., 663). If the appeal is taken to the [fol. 62] Commissioner of Education (under Education Law 310), that section provides that his determination is *final* and cannot be reviewed by the courts. In such case it is possible that the Regents' listing of an organization and the teacher's disqualification thereunder would constitute conviction and punishment without a juricial trial. If the appeal be taken to the courts in an article 78 proceeding (under Education Law 2523) the court's review might well be "inadequate if not illusory" (*Kirn v. Noyes*, 262 App. Div. 581), since it is but a limited review on the record alone and the determination could be disturbed only if it had no warrant in the record, no reasonable basis in law

and was arbitrary or capricious. It has been the unfortunate tendency of our courts in recent years largely to abdicate their true functions and powers in proceedings to review the determination of administrative bodies, so that to-day "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Matter of Park East Land Corp'n v. Finkelstein*, 299 N. Y., 70, 75). Here too, then, for all practical purposes, the procedure might be tantamount to conviction and punishment without judicial trial.

The teacher seeking to appeal finds himself confronted with still another question: Can he appeal to the courts under Civil Service Law, section 12-a(d) where the disqualification was under the procedure established by the Feinberg Law? The Feinberg Law itself neither contains machinery for appeals nor refers to any other statute in that regard. However, it is part of the Education Law, as are sections 310 and 2523, previously referred to, and [fol. 63] these three sections deal exclusively with teachers and administrative personnel of the Department of Education. Civil Service Law 12-a, on the other hand, is a general statute applicable to all civil service employees of the state and city. It seems likely that the appeal statutes dealing specifically with teachers (Education Law 310 and 2523) would control the general statute dealing with all civil service employees (Civil Service Law 12-a) and consequently would bar the right of a teacher to come into court under section 12-a(d).

In short, a teacher discharged under the Feinberg Law would find himself on the horns of a dilemma. If he appeals to the commissioner of education he loses his recourse to the courts; if he starts an article 78 proceeding the court's review (on the record alone) is "inadequate if not illusory"; if he goes into court under Civil Service Law 12-a(d) he probably will be confronted with a court ruling that his proper remedy was under Education Law 310 or 2523—and this at a time when, in all likelihood, the statute of limitations already has run on these other remedies.

Finally, an analysis of the Feinberg Law and of Civil Service Law 12-a(c), as implemented, discloses that they unmistakably embody the doctrine of guilt by association, which doctrine has been condemned by the United States

Supreme Court (*Schneiderman v. United States*, 320 U. S., 118, 136).

As previously indicated the Feinberg Law is an administrative statute that provides machinery for the enforcement of Civil Service Law 12-a, the latter being substantive in nature. Section 12-a defines the offense—the Feinberg Law provides how its commission may be established. [fol. 64]

The following are the offenses defined in section 12-a:

Subdivisions (a) and (b) disqualify teachers who personally advocate violent overthrow of the government by every conceivable form of utterance, oral or written. In short, they cover all forms of *personal* guilt. Consequently, subdivision (c), which disqualifies one who “becomes a member of any society” that advocates the proscribed doctrines, obviously adds another form of guilt—guilt through mere membership in a subversive organization even in the absence of personal guilt. Though personal non-guilt would thus be a defense to a charge made under subdivision (a) or (b), it would be no defense where the charge is mere membership under subdivision (c).

What does the Feinberg Law provide as to how a charge of membership in a subversive organization [under section 12-a(c)] shall be proved? It first directs the Board of Regents to promulgate a list of organizations which advocate the doctrines prohibited by section 12-a. It then provides that membership in “any such organization included in such listing” shall constitute *prima facie* evidence of disqualification. Disqualification for what offense? Obviously for membership in an organization that advocates violent overthrow of the government. But this offense [defined in section 12-a(c)] has only two elements—membership in an organization and advocacy by the organization of violent overthrow of the government. The first element, membership, must be established by direct proof. The second, advocacy by the organization of the proscribed doctrine, is established *prima facie* by the fact that the organization has been listed by the Board of Regents—the intention of the Legislature, of course, being to obviate the need for a protracted trial each time a teacher is accused of membership under section 12-a(c). The two together make out a complete case against the teacher.

Should the teacher defend, what defenses may he interpose? Only the same two that he could formerly interpose to a charge under section 12-a(c) alone—either his non-membership or the organization's non-advocacy of proscribed doctrines. For the offense with which he is charged, under Feinberg Law procedures, is still a violation of section 12-a(c)—membership in an organization that advocates violent overthrow of the government. Here, again, then, personal non-guilt is no defense since the charge is still mere membership even though the administrative procedure employed is that set out in the Feinberg Law. What this constitutes, of course, is the finding of guilt from mere association without proof of personal guilt.

That this may not be done under our law is clear.

In the court's charge to the jury in the case of *United States v. Foster et al.*, which involved a prosecution under a comparable statute, Judge Medina said: "Under our system of law, guilt is purely personal and you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party, no matter what you find were the principles and doctrines which were taught or advocated by that party." This has been the most recent reiteration of the established principle that: "Under our traditions beliefs are personal and not [fol. 66] a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles" (*Schneiderman v. United States*, 320 U. S., 118, 136; see also "Loyalty Tests and Guilt by Association," 61 Harv. L. Rev., 592, John Lord O'Brien).

The cumulative effect of the procedure as outlined then is this: At an "appropriate" hearing by the Board of Regents (an administrative body) an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hearing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire *prima facie* case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's non-reviewable hearing and finding which was *ex parte*

and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination "in good faith." Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilt from mere membership, without any proof of personal guilt—the teacher's personal non-guilt in fact being irrelevant where the only charge is membership.

It does not appear to this court that these procedures add up to "those fundamental requirements of fairness which are of the essence of due process" (*Morgan v. United* [fol. 67] States, 304 U. S., 1, 19).

Consequently subdivision (c) of Civil Service Law 12-a (as implemented by the Feinberg Law), section 2 of Education Law 3022 (Feinberg Law) and the Regents' Rules promulgated thereunder are unconstitutional under the due process clause of the Fourteenth Amendment.

In so holding it may be observed that the foregoing determination in no way impairs the power of the Board of Regents, under the other adequate provisions of existing law, to promulgate and enforce reasonable rules and regulations designed to rid the school system of teachers found to be unfit.

In view of this determination, the motion to intervene is denied and the motion for a temporary injunction is not passed upon.

Judgment upon the pleadings is granted to plaintiffs to the extent indicated. Submit orders and judgment accordingly.

[fol: 68] WAIVER OF CERTIFICATION OMITTED

[fol. 69] SUPREME COURT OF NEW YORK

NOTICE OF APPEAL TO COURT OF APPEALS

[Title Omitted]

Sir:

Please take notice that plaintiffs Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel

[fol. 70] Krieger, William Newman, Dave Tiger and Edith Tiger do hereby appeal to the Court of Appeals of the State of New York from the judgment entered herein in the office of the Clerk of the County of Kings on April 5, 1950 upon an order of the Appellate Division, Second Department entered in the office of the Clerk of said Appellate Division on March 27, 1950 denying said plaintiffs' motion for judgment on the pleadings, dismissing their complaint, and reversing a judgment of the Supreme Court, Kings County entered in the office of the Clerk of the County of Kings on December 21, 1949 adjudging (1) that subdivision c of section 12-a of the civil service law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision 2 of section 3022 of the education law added by the Feinberg Law, and (3) that section 254 of Chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law, are null, void and unconstitutional, and enjoining and restraining defendant from enforcing any of the provisions thereof, and the said plaintiffs appeal from each and every part of said judgment of the Appellate Division as well as from the whole thereof.

Dated, New York, May 11, 1950.

Yours, etc., Witt & Cammer, Attorneys for Plaintiffs,
Office & P. O. Address, 9 East 40th Street, Borough
of Manhattan, City of New York.

[fol. 71] To: John P. McGrath, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York, New York; Francis J. Sinnott, Clerk of Kings County, Fulton and Joralemon Streets, Brooklyn, New York.

[fol. 72] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

APPELLATE DIVISION ORDER OF REVERSAL—March 27, 1950

[Title Omitted]

The above named The Board of Education of the City of New York, the defendant in this action, having ap-

pealed to the Appellate Division of the Supreme Court [fol. 73] from so much of a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 21st day of December, 1949, adjudging and decreeing (1) that subdivision c of section 12a of the Civil Service Law, as implemented by chapter 360, Laws of 1949, known as the Feinberg Law, (2) that subdivision 2 of section 3022 of the Education Law, added by the Feinberg Law and (3) that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and enjoining and restraining The Board of Education of the City of New York from enforcing any of the provisions thereof, which judgment was entered pursuant to an order of said Court dated December 16th, 1949, granting as to plaintiffs-respondents a motion for judgment on the pleadings under Rule 112, Rules of Civil Practice, herein, and the said appeal having been argued by Mr. Michael A. Castaldi, Assistant Corporation Counsel, of Counsel for appellant, and argued by Mr. Harold I. Cammer of Counsel for plaintiffs-respondents, and submitted by Mr. John P. Walsh of Counsel for Kings County Committee of the American Legion, as amicus curiae, and submitted by Mr. R. Lawrence Siegel and others, of Counsel for Association of Teachers of the Social Studies in the City of New York, as amicus curiae, and submitted by Mr. Paul O'Dwyer and others, of Counsel for New York City Chapter of the National Lawyers Guild, as amicus curiae, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

[fol. 74] It is Ordered and Adjudged that the judgment insofar as appealed from be and the same hereby is unanimously reversed on the law, with \$10. costs and disbursements, the motion for judgment on the pleadings denied, with \$10. costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

Enter: John J. Callahan, Clerk.

SUPREME COURT OF NEW YORK

JUDGMENT OF REVERSAL APPEALED FROM

✓The defendant-appellant having appealed to the Appellate Division of the Supreme Court, Second Department, [fol. 75] from so much of the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949 adjudging and decreeing (1) that subdivision c of section 12a of the Civil Service Law, as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law, (2) that subdivision 2 of section 3022 of the Education Law, added by the Feinberg Law and (3) that section 254 of chapter XV-B of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, void and unconstitutional, and enjoining and restraining The Board of Education of the City of New York from enforcing any of the provisions thereof, which judgment was entered pursuant to an order entered herein on or about the 16th day of December, 1949 granting as to plaintiffs-respondents a motion for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and the appeal having been duly argued at the Appellate Division and that Court in an order entered in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950 having ordered and adjudged that the judgment in so far as appealed from be unanimously reversed on the law, with \$10 costs and disbursements, the motion for judgment on the pleadings denied, with \$10 costs, and the complaint dismissed, under Rule 112 of the Rules of Civil Practice, with costs, and the costs of the defendant-appellant having been duly taxed at the sum of \$364.06,

Now, on motion of John P. McGrath, Corporation Counsel, attorney for defendant-appellant, it is [fol. 76] Adjudged that the judgment in so far as appealed from be and the same hereby is reversed on the law and the motion for judgment on the pleadings denied, and it is further

Adjudged that the complaint be and the same hereby is dismissed, and it is further

Adjudged that the defendant-appellant The Board of Education of the City of New York (110 Livingston Street,

Brooklyn, N. Y.) recover of the plaintiffs-respondents, Irving Adler, George Friedlander, Mark Friedlander, Martha Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger (Address—see below) the sum of \$364.06, costs as taxed and that said defendant-appellant have execution therefor.

Dated, April 5th, 1950.

Francis J. Sinnott, Clerk.

Adler—36-12 Corporal Kennedy Drive, Bayside, Queens.
Geo. Friedlander

Mark Friedlander—43-03 Skillman Ave. L. I. City.

Spencer—31-40 76th Street, Jackson Hgts, Queens.

Krieger—96-18 72nd Ave., Forest Hills, Queens.

Newman—4422 Bedford Ave., Bklyn.

Dave Tiger

Edith—233 Exeter St., Bklyn.

[fol. 77] SUPREME COURT OF NEW YORK, APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

OPINION OF APPELLATE DIVISION

[Title Omitted]

Appeal from so much of a judgment of the Supreme Court reported in 276 App. Div. 527, entered December 21, 1949, in Kings County, in accordance with an order of the court at Special Term, which granted a motion as to certain plaintiffs, under Rule 112, Rules of Civil Practice, for judgment on the pleadings, declaring section 12-a, subdivision (c), Civil Service Law, as implemented by Laws of 1949, chapter 360, and section 3022, subdivision 2, Education Law, and chapter XV-B, section 254, of the Rules of [fol. 78] the Board of Regents, to be unconstitutional, and granted other relief.

John P. McGrath, Corporation Counsel (Seymour B. Quel, Michael A. Castaldi and Morris Weissberg with him on the brief), for appellant. Harold I. Cammer for respondents. John P. Walsh and others for Kings County Committee of the American Legion, amicus curiae. Paul O'Dwyer and

others for New York City Chapter of the National Lawyers Guild, amicus curiae. Arthur C. Buck and others for Association of Teachers of the Social Studies in the City of New York, amicus curiae. R. Lawrence Siegel and others for American Civil Liberties Union, amicus curiae.

CARSWELL, J.:

We are required to pass upon the constitutionality of two statutes. One is section 12-a, subdivision (c), of the Civil Service Law, and the other is section 3022 of the Education Law (L. 1949, ch. 360), the so-called "Feinberg Law." The former bans organizing a society or group advocating the overthrow of the State or National government by force, as well as membership therein. The latter implements Civil Service Law, section 12-a, in respect of its enforcement and, *inter alia*, provides for the removal of [fol. 79] superintendents, teachers and employees in the educational system who continue as members of subversive organizations.

We may not pass upon the validity of administrative action thereunder or Regents' rules adopted pursuant thereto; such issues are not justiciable in this action.

The principles to which recourse must be had to resolve the contentions respecting the validity of the challenged statutes are elementary. The application of these principles does not present a novel or unique problem. These principles, and the reasoning vindicating them, have been the subject of prolix exposition in opinions without number. Consequently, after a thorough analysis of the arguments advanced and the cases invoked, both relevant and irrelevant, it will suffice merely to state our determinative conclusions on the pertinent or decisive contentions pressed upon us.

(1) The wisdom or unwisdom of the challenged statutes and the propriety of their enactment presents a legislative and not a judicial problem.

(2) The offenses defined in section 12-a, Civil Service Law, are crimes under section 161, Penal Law, and Title 18, United States Code, section 2385. These latter enactments have been held to be constitutional. (*Gitlow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357;

Dunne v. United States, 138 F. 2d 137, certiorari denied 320 U. S. 790.) Hence, section 12-a, subdivision (c), Civil Service Law, is valid.

It is patently within the power of the Legislature, to promote the general welfare and protect the public service, to provide, as a reasonable condition governing public employment, that upon the commission of certain offenses described in section 12-a, Civil Service Law, public employment shall be discontinued. A constitutional right of free speech may be abridged as a condition to the enjoyment of public employment. One does not have a constitutional right to be a public employee except upon compliance with reasonable conditions imposed upon all, or imposed under reasonable classifications. (*United Public Workers v. Mitchell*, 330 U. S. 75; *McAuliffe v. New Bedford*, 155 Mass. 216; *People ex rel. Clifford v. Scannell*, 74 App. Div. 406, affd. on opinion below, 173 N. Y. 606; *Friedman v. Schwellenbach*, 159 F. 2d 22, certiorari denied 330 U. S. 838; *Washington v. Clark*, 84 Fed. Supp. 964; *Pawell v. Unemployment Compensation Bd. of Review*, 146 Pa. Superior Ct. 147; *Matter of Rabouine v. McNamara*, 275 App. Div. 1052; *People v. American Socialist Society*, 202 App. Div. 640). The condition here imposed and the classification made are reasonable.

(3) A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under section 3022, subdivision 2, Education Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member-employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, more-[fol. 81] over, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in section 12-a, subdivision (c), in re-

spect to membership by an employee in a described organization means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, § 12-a, subd. d.) The statute is prospective in operation and conforms with due process of law. (*Morgan v. United States*, 304 U. S. 1, 15; *Tot v. United States*, 319 U. S. 463, 467; *Casey v. United States*, 276 U. S. 413, 418; *Manley v. Georgia*, 279 U. S. 1, 6; *People v. Pieri*, 269 N. Y. 315, 324; *People ex rel. Beardsley v. Barber*, 266 App. Div. 371, affd. 293 N. Y. 706.)

(4) The contention that the statute (L. 1949, ch. 360; Education Law, § 3022) is a bill of attainder and, therefore, invalid, is without merit. It is predicated upon language in the preamble thereto and not contained in the statute. It is unsound and irrelevant to an inquiry as to the validity of the statute. It is long settled doctrine that such a preamble is not part of a statute. Recourse to a preamble is permissible only when ambiguity is to be resolved, or statutory language interpreted. (*Neumann v. City of New York*, 137 App. Div. 55, 59; *Westchester County S. P. C. A. v. Mengel*, 266 App. Div. 151, 155, affd. 292 N. Y. 121; *Pumpelly v. Village of Owego*, 45 How. Pr. 219; *Goodell v. Jackson*, 20 Johns. 693, 722.)

[fol. 82] Irrespective of references in the preamble to the Communist Party and its affiliated organizations, section 3022, Educational Law, provides for a finding, after a hearing on notice, as to all organizations. The provisions of the statute and not the references in the preamble are determinative.

The challenged statutes are constitutional.

(5) The validity of the rule of the Board of Regents need not be considered. No list has as yet been published, and any rule may be withdrawn and substituted prior to its practical application. Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby. (*Bandini Co. v. Superior Court*, 284 U. S. 8, 22; *Town of Pierrepont v. Loveless*, 72 N. Y. 211, 216.)

(6) The allegations in the complaint with respect to proposed expenditures by the defendant are expressly denied

in the answer. This issue of fact precludes the granting of a judgment on the pleadings in favor of the plaintiffs.

The judgment, in so far as appealed from should be reversed on the law, with \$10 costs and disbursements, the motion for judgment on the pleadings denied, with \$10 costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

[fol. 83] STIPULATION WAIVING CERTIFICATION OF RECORD
TO THE COURT OF APPEALS OMITTED

[fol. 84] IN COURT OF APPEALS OF NEW YORK

ROBERT THOMPSON, as Chairman of the Communist Party
of the State of New York, et al., *Appellants*,

v.

WILLIAM J. WALLIN et al., Constituting the Board of Regents of the University of the State of New York, *Respondents*.

In the Matter of CHARLES L'HOMMEDIEU et al., *Appellants*,
against BOARD OF REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK et al., *Respondents*

ABRAHAM LEDERMAN, as President of Teachers Union of the
City of New York, Local 555 of the United Public Workers, et al., *Plaintiffs*, and IRVING ADLER et al., *Appellants*,
v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, *Respondent*

OPINION—November 30, 1950

Appeal, in the first above-entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon [fol. 85] an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the court at Special Term (Shirick, J.; opinion 196 Misc. 686, granting a motion by plaintiffs for judgment on the pleadings declaring unconstitutional chapter 360 of the Laws of 1949 (2) declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

Appeal, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court

at Special Term (Shirick, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division directed a dismissal of the petition.

Appeal, in the third above-entitled action from a judgment in favor of defendant, entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (Hearn, J.; Opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (A) declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law, as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (B) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

- o Abraham Unger, Osmond K. Fraenkel, David M. Freedman and Bernard Jaffe for appellants in first above-entitled action. Samuel M. Birnbaum [fol. 86] and Solomon Kreitman for American Legion Department of New York, amicus curiae, in support of respondents' position in first above-entitled action. Frederic A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and Morris Eisenstein for Appellants in second above-entitled proceeding. Nathaniel L. Goldstein, Attorney-General (Wendell P. Brown and Ruth Kessler Toch of Counsel) for Respondents in second above-entitled proceeding. Arthur Garfield Hays and Osmond K. Fraenkel for Appellants in third above-entitled action. John P. McGrath, Corporation Counsel (Michael A. Castaldi, Seymour B. Quel and Morris Weissberg of counsel), for respondent in third above-entitled action.

LEWIS, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360) commonly known, and hereinafter referred to as the Feinberg Law.*

[fol. 87] At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed throughout the broad field of State civil service. Thus we find that by the Laws of 1947, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or

* The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

Thompson et al. v. Wallin et al. (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Honnmedieu et al. v. Board of Regents et al. (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949

the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word [fol. 88] of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political

[Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law . . . and to treat said enactment as a nullity" At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. Board of Education of City of New York (276 App. Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

“(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

“(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

“(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.”

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

“Section 1. The legislature hereby finds and declares that [fol. 89] there is common report that members of the subversive groups; and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state.

This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplors the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace [fol. 90] and to report thereon regularly to the state legislature." *

* Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360; added to the Education Law as section 3022, provides as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law..

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar [fol. 91] listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purpose of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute

prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn. v. Douds*, 339 U. S. 382, 400-401; *People v. Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for the appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*) [fol. 92]—an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he

serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers v. Mitchell*, 330 U. S. 75, 100; *American [fol. 93] Communications Assn. v. Douds*, *supra*, p. 405; *New York ex rel. Bryant v. Zimmermann*, 278 U. S. 63, 72-73; *Patson v. Pennsylvania*, 232 U. S. 138, 144; *Hawker v. New York*, 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge Holmes—as he then was—to write in *McAuliffe v. Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the *Feinberg Law*, is incompatible with freedoms

guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preservation. We are also aware that those freedoms do not sanction unbridled license. (*People v. Gitlow*, 234 N. Y. 132, 137, affd. *sub nom. Gitlow v. New York*, 268 U. S. 652-666-667; *Schenck v. United States*, 249 U. S. 47, 52.) Indeed " * * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." (*American Communications Assn. v. Douds, et al. supra*, p. 394.) When *People v. Gitlow (supra)*, reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents [fol. 94] the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and in the *Gilbert Case* [254 U. S. 325], that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. * * * It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. * * * In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied." (Emphasis supplied.) (See, also, *Cox v. New Hampshire*, 312 U. S. 569, 674; *Gilbert v. Minnesota*, 254 U. S. 325, 332, 339; *Schenck v. United States*, *supra*, p. 52; *Fox v. Washington*, 236 U. S. [fol. 95] 273, 276-277; *Patterson v. Colorado*, 205 U. S. 454, 462; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 294; *Robertson v. Baldwin*, 165 U. S. 275, 281; *People v. Most*, 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which threatened the well-being of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislature has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unrea-

sonable attempt to exercise the authority vested in the State in the public interest." (*Whitney v. California*, 274 U. S. 357, 371.) Paraphrasing what was written in *Gillow v. New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *"; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency."

Whether that danger was "clear and present"—within the rule of *Schenck v. United States* (*supra*, p. 52) as interpreted and applied in *American Communications Assn. v. Douds* (*supra*, pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years by those who [fol. 96] teach them and to whom the children look for guidance, authority and leadership; and that members of such groups frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be dis-

seminated among children in attendance at the public schools.

A bill of attainder has been defined as " * * * a legislative act which inflicts punishment without a judicial trial." (*Cummings v. Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly v. Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions of the Feinberg Law — section 3022 — in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subver-[fol. 97] sive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn. v. Douds*, *supra*, pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise,

teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "after inquiry; and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts v. Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion

the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

LOUGHRAN, Ch. J., CONWAY, DESMOND, DYE, FULD and FROESSEL, JJ., concur.

Judgment accordingly.

[fol. 99] IN COURT OF APPEALS OF NEW YORK

[fol. 100] ABRAHAM LEDERMAN, as President &c., & ors.,
Plaintiffs,

IRVING ADLER & ors. Appellants,
a'gst.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Respondent

REMITTITUR—December 1, 1950

Be it remembered, That on the 28th day of September in the year of our Lord one thousand nine hundred and fifty, Irving Adler & ors., the appellants in this cause, came here unto the Court of Appeals, by Witt & Cammer, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Board of Education of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by John P. McGrath, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur G. Hayes and Osmond K.

Fraenkel, of counsel for the appellants, and by Mr. Michael A. Castaldi, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court [fol. 101] appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

(sgd) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing transcript omitted in printing:

[fol. 102] IN SUPREME COURT OF NEW YORK

[Title Omitted]

ORDER—December 13, 1950

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Second Department, entered herein in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950, reversing the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949 adjudging (1) that subdivision (c) of § 12-a of the Civil Service Law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision (2) of § 3022

of the Education Law added by the Feinberg Law; and [fol. 103] (3) that § 254 of Chapter XY-b of the Rules of the Board of Regents, adopted July 15, 1949 pursuant to the Feinberg Law are nulled, voided and unconstitutional, and enjoining and restraining the defendant-respondent from enforcing any of the provisions thereof and denying plaintiffs-appellants' motion for judgment on the pleadings and dismissing the complaint; and the appeal having been duly argued at the Court of Appeals and that Court in an order dated the 30th day of November, 1950 having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be affirmed with costs; and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court there to be proceeded upon according to law;

Now upon reading and filing the remittitur from the Court of Appeals and on motion of John P. McGrath, Corporation Counsel, attorney for defendant-respondent, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby is made the order and judgment of this Court.

Enter, C. E. M., J. S. C.

Granted Dec. 13, 1950, Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 104] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS

ABRAHAM LEDERMAN as President of Teachers Union of The City of New York, Local 555 of the United Public Workers, and others, Plaintiffs,

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER and EDITH TIGER, Plaintiffs-Appellants,
against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Defendant-Respondent

JUDGMENT—Filed December 22, 1950

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division

of the Supreme Court, Second Department, entered herein in the office of the Clerk of said Appellate Division on or about the 27th day of March, 1950, which judgment reversed the judgment entered herein in the office of the Clerk of the County of Kings on or about the 21st day of December, 1949, adjudging (1) that subdivision (c) of § 12-a of the Civil Service Law as implemented by Chapter 360, Laws of 1949, known as the Feinberg Law; (2) that subdivision (2) of § 3022 of the Education Law added by the Feinberg Law; and (3) that § 254 of Chapter XV-b of the Rules of the Board of Regents adopted July 15, 1949, pursuant to the Feinberg Law are null, voided and unconstitutional, and enjoining and restraining the defendant-[fol. 105] respondent from enforcing any of the provisions thereof and denying plaintiffs-appellants' motion for judgment on the pleadings and dismissing the complaint; and the appeal having been duly argued at the Court of Appeals and that court in an order dated the 30th day of November, 1950, having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and an order having been duly entered in the office of the Clerk of the County of Kings on or about the 13th day of December, 1950, making the order of the Court of Appeals the order of the Supreme Court, and the costs of the defendant-respondent having been duly taxed at the sum of \$268.43.

Now, on motion of John P. McGrath, Corporation Counsel, attorney for defendant-respondent, it is

Adjudged that the judgment so appealed from be and the same hereby is affirmed, and it is further

Adjudged that the defendant-respondent, The Board of Education of the City of New York (110 Livingston Street, Borough of Brooklyn, New York City) recover of the plaintiffs-appellants Irving Adler (3812 Corporal Kennedy Drive, Bayside, Borough of Queens, New York City), George Friedlander and Mark Friedlander (43-03 Skillman Avenue, Long Island City, Borough of Queens, New York City), Marta Spencer (31-40 76th Street, Jackson Heights, Borough of Queens, New York City), Samuel Krieger (96-[fol. 106] 18 72nd Avenue, Forest Hills, Borough of Queens, New York City), William Newman (4422 Bedford Avenue, Borough of Brooklyn, New York City), Dave

Tiger and Edith Tiger (233 Exeter Street, Borough of Brooklyn, New York City), the sum of \$268.43 Dollars, costs as taxed, and that said defendant-respondent have execution therefor.

Dated, December 22nd, 1950.

Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

Notice and service omitted.

[fol. 107] IN COURT OF APPEALS OF NEW YORK

[Title Omitted]

ORDER ALLOWING APPEAL—January 17, 1951

It appearing to this Court that Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger have filed their petition for appeal to the United States Supreme Court and have filed therewith their assignment of errors as well as their statement as to the jurisdiction of said Court as required by Rule 12 thereof disclosing that said Court has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York rendered on November 30, 1950 affirming the dismissal of their complaint, it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the judgment of the Court of Appeals of the State of New York rendered November 30, 1950 affirming the dismissal of plaintiffs' complaint by the Supreme Court of the State of New York, and that said appellants give a bond with good and sufficient security in the sum of \$250.00 that they as appellants shall prosecute their appeal to effect and also pay damages and costs [fol. 108] if they fail to make their appeal good.

Dated: January 17th, 1951.

John T. Loughran, Chief Judge of the Court of Appeals.

[fol. 109] IN COURT OF APPEALS OF NEW YORK

[Title Omitted]

PETITION FOR ALLOWANCE OF APPEAL

To the Hon. John T. Loughran, Chief Judge of the Court of Appeals:

Appellants, Irving Adler, George Friedlander, Mark Friedlander, Marta Spencer, Samuel Krieger, William Newman, Dave Tiger and Edith Tiger, feeling aggrieved by the judgment of the Court of Appeals of the State of New York rendered November 30, 1950, affirming the dismissal of their complaint for the reasons set forth in their Assignment of Errors included herein pursuant to Rule 36, Paragraph 1, of the Rules of the Supreme Court of the United States, respectfully pray that an appeal be allowed to the Supreme Court of the United States from the judgment of the Court of Appeals pursuant to the provisions of Section 1257 of Title 28 of the United States Code.

Pursuant to Rule 12 of the Rules of the United States Supreme Court, appellants present with this petition a separate typewritten statement particularly discussing the basis on which they claim the Supreme Court of the United [fol. 110] States has jurisdiction to review the judgment in question.

Statement

This case is one in which is drawn into question the validity of Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law of the State of New York, commonly known as the Feinberg Law, on the ground that on its face and as construed by the Court of Appeals of New York said statute is repugnant to the Fourteenth Amendment to the Constitution of the United States, the decision of said Court of Appeals being in favor of the validity of such section as so construed.

Therefore, in accordance with Rule 36, Paragraph 1, of the Rules of the Supreme Court of the United States and Section 1257, Title 28, of the United States Code, appellants respectfully show the case is one in which a review may be had in the Supreme Court on appeal as a matter of right, and accordingly pray that such appeal be allowed

and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Assignment of Errors

Appellants in the above case together with the foregoing petition for allowance of appeal to the Supreme Court of the United States file herewith the following assignment of errors which they allege were committed by the Court of Appeals of New York in its judgment affirming the dismissal of their complaint:

[fol. 111] 1. The Court of Appeals erred in holding that the Laws of 1949, Chapter 360, being Section 3022 of the Education Law of the State of New York, is constitutional and valid on its face and in refusing to hold that it abridges freedom of speech and of assembly guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals erred in holding that the Laws of 1949, Chapter 360, being Section 3022 of the Education Law of the State of New York, is constitutional and valid on its face and in refusing to hold that it abridges due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals erred in affirming the dismissal of plaintiffs' complaint, which dismissal was based upon its construction of said section of the Education Law.

Wherefore appellants pray that the judgment of the Court of Appeals of November 30, 1950 affirming the judgment of the Supreme Court of the State of New York dismissing plaintiffs' complaint be reversed.

Dated: January 11th, 1951.

Respectfully submitted, Arthur Garfield Hays, Attorney for Appellants.

[fol. 112] Citation in usual form showing service on John P. McGrath omitted in printing.

[fols. 113-114] Praeceptum omitted.

[fol. 115] Bond on Appeal for \$250.00 omitted in printing.

[fol. 116] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed

February 15, 1951

To The Clerk of the United States Supreme Court:

Please take notice that appellants intend to rely upon the following points and designate the entire record as necessary for their consideration:

1. Section 3022 of the Education Law of the State of New York as enacted by Laws of 1949, Chapter 360, is unconstitutional in that it abridges freedom of speech and of assembly as guaranteed by the Fourteenth Amendment to the Constitution of the United States.
2. Section 3022 of the Education Law of the State of New York as enacted by Laws of 1949, Chapter 360, is unconstitutional in that it abridges due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated: February 13, 1951.

Yours, etc., Arthur Garfield Hays, Attorney for Appellants, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

To: Corporation Counsel of the City of New York, Municipal Building, New York 7, N. Y.

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 541

ORDER NOTING PROBABLE JURISDICTION—June 4, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(6152)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 341 8

**IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, ET AL.,**

Appellants,

vs.

**THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK**

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

**ARTHUR GARFIELD HAYS,
OSMOND K. FRANKEL,**
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 541

**IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, MARTA SPENCER, SAMUEL
KRIEGER, WILLIAM NEWMAN, DAVE TIGER AND
EDITH TIGER,**

against

Appellants,

**THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK,**

Appellee

STATEMENT AS TO JURISDICTION

Appellants having presented this day their petition for appeal now file this, their statement, of the basis on which they contend that the Supreme Court of the United States has jurisdiction to review the judgment in question and to exercise such jurisdiction in this case.

**The Statutory Provisions Believed to Sustain the
Jurisdiction**

This appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest court of the State of New York in which a decision in the

within matter can be had. There is drawn into question the validity of Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law of the State of New York, on the ground that, on its face and as construed, it is repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of said statute. This Court has jurisdiction on appeal to review the final judgment in question by virtue of the express provision set forth in Title 28 U. S. C., Section 1257.

The Statute Involved

Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law, reads as follows:

"Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without

regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplors the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

"§2. Section three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

"§3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate

the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as

may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

"§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

"3022. Elimination of subversive persons from the public school system.

"3023. Liability of a board of education, trustee or trustees.

"3024. Teachers responsible for record books.

"3025. Verification of school register.

"§ 5. This act shall take effect July first, nineteen hundred forty-nine."

Rules were issued by the Board of Regents for the implementation of said statute as follows:

**"RULES OF THE BOARD OF REGENTS
(Adopted July 15, 1949)**

Chapter XV-B

Subversive Activities

"Section 254 *Disqualification or removal of superintendents, teachers and other employes.*

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

"a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory

provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

"b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

"c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

"d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

"e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dis-

missal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

"2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith."

"3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures

taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

"4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

"5. This section shall take effect immediately."

Date of Judgment Sought To Be Reversed and the Date Upon Which the Application For Appeal Is Presented

The judgment of the Court of Appeals which is here sought to be reversed was rendered on November 30, 1950. This application for appeal is presented January 16, 1951.

Statement Showing That the Nature of the Case and the Rulings of the Court Are Such As To Bring the Case Within the Jurisdictional Provision Relied Upon

The issues in this case were presented to the state court by a motion for judgment on the pleadings made by plaintiffs (p. 8).¹ Two other actions were brought in the state courts presenting substantially the same questions, all of which were heard and decided together by the Court of Appeals. Appeals are also being presented to this Court in those actions which are entitled "Thompson v. Wallin" and "Matter of L'Hommedieu v. Board of Regents".

The pleadings consisted of a complaint and an answer. The complaint (pp. 9-29) sought a declaration that Chapter 360 of the Laws of 1949, commonly known as the Feinberg Law, was unconstitutional and that the rules prepared to implement it were likewise unconstitutional (see p. 85).

The action was originally brought by various groups of plaintiffs, the Teachers Union (pp. 9-10), individuals who were only teachers (p. 10) and others who were both teachers and taxpayers (pp. 10-12) as well as some who were parents (pp. 12-14) and others who were connected with various organizations. At Special Term the complaint was dismissed as to all those who were not taxpayers (pp. 4-5). It survives in this Court, therefore, only as to those plaintiffs taxpayers whose names are set forth in the caption.

¹ The references are to the pages of the record as printed for use in the Court of Appeals of the State of New York.

The complaint attacks the laws and the regulations issued thereunder as violating the Fourteenth Amendment to the United States Constitution in various respects (see pp. 21, 24).

At Special Term Mr. Justice Hearn accepted the contentions advanced by plaintiffs that the laws and regulations denied due process (pp. 55-199). A copy of this opinion is hereto annexed. The opinion rested expressly upon the due process clause of the Fourteenth Amendment (p. 199).

In the Appellate Division this determination was reversed (pp. 78-82). A copy of the opinion of that Court is also hereto annexed. The various constitutional attacks upon the statute were discussed and held unavailing.

Likewise in the Court of Appeals the opinion of the Court (a copy of which is hereto annexed) expressly passed upon and rejected the contention of plaintiffs that the statute denied due process under the Fourteenth Amendment in various respects.

The opinion of the Court of Appeals thus construed the statute to permit the Board of Regents to promulgate lists of allegedly subversive organizations and permit the educational authorities on the basis of such lists to declare employees in the educational system (both teachers and nonteachers) to be prima facie disqualified from continuing to hold their positions merely because of membership in any such organizations.

Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial and the Authorities Relevant Thereto

1. The statute and the regulations issued thereunder have the effect of disqualifying persons from employment as teachers or from other employment in connection with the educational facilities of the state and its subdivisions

merely because of membership in an organization alleged to be subversive. In so doing they interfere with freedom of speech and of assembly guaranteed to all persons against state action by the due process clause of the Fourteenth Amendment.

West Virginia State Board of Education v. Barnette,
319 U. S. 624;

Thomas v. Collins, 323 U. S. 516;

Winters v. New York, 330 U. S. 507.

2. The statute and the regulations issued thereunder create an unreasonable presumption which denies due process of law as guaranteed by the Fourteenth Amendment.

Bailey v. Alabama, 219 U. S. 219;

McFarland v. American Sugar Co., 241 U. S. 79;

Manley v. Georgia, 279 U. S. 1;

Tot v. United States, 319 U. S. 463;

Pollock v. Williams, 322 U. S. 4;

Mobile, Jackson & Kansas City RR. v. Turnispeed,
219 U. S. 35.

ARGUMENT

I. The Feinberg Law and the Regulations Issued Thereunder Constitute An Abridgement of Freedom of Speech and of Assembly

Education Law §3022 and the regulations issued by the Board of Regents (pp. 95-107) necessarily restrict the liberties of all persons in the teaching service. The regulations (pp. 102, 103) in effect command all such persons to sever relations with all organizations listed by the Regents within ten days on pain of loss of position. And this, regardless of the correctness of the list, of the pendency of judicial proceedings to review a particular listing. And it is no answer to say that if the Regents should be overruled in some instances persons who were members

of such organizations would not be penalized. The risk they run is too great to condone the interference with freedom of association.

Aside from this particular incidence of the regulations, there can be no doubt of the restrictive effect of the entire scheme on our cherished liberties. Such attempts at restriction are, of course, not new in our national life. After the First World War fear of the then recent Soviet Revolution led to the enactment of similar legislation, known as the Lusk Laws (Laws of 1921, Ch. 666). So eminent a patriot as Alfred E. Smith had vetoed this legislation when first passed in 1920. And he led the fight for repeal a few years later. He said as he signed the repealer:

"The Lusk Laws * * * are repugnant to the fundamentals of American Democracy * * *. Teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to governmental matters deemed by the state officer consistent with loyalty * * *. Freedom of opinion and freedom of speech were by these laws unduly shackled and an unjust discrimination was made against the members of a great profession. In signing these bills I firmly believe I am vindicating the principle that within the limits of the penal law every citizen may speak and teach what he believes" (School and Society, XVII [June 9, 1923], 635).

Similar consequences flow from the impact of the program devised by the new legislation on teachers generally as well as on particular individuals who might be brought up on charges. For laws such as these create fear and timidity wholly incompatible with the intellectual atmosphere in which teachers should live. They will become afraid to join movements or express views which might be challenged lest they be caught in the dragnet of the Regents' lists.

We submit that there can be little doubt that restrictions such as those imposed by this legislation violate constitutional provisions contained both in the federal and in the state Constitutions. Applicable here, of course, is the due process clause of the Fourteenth Amendment which, by repeated decisions of this Court, has been held to make binding on the states the prohibition contained in the First Amendment that no law shall be made "abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances". The most recent expression on this subject is in *Terminiello v. Chicago*, 337 U. S. 1.

It is also settled by repeated decisions of this Court that governmental authority may not seek to impose conformity of belief or expression on the people. As Mr. Justice Jackson said in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 at 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Particularly important is it that there should be freedom of discussion on political subjects. See *Stromberg v. California*, 283 U. S. 359 at 369. See also *Thomas v. Collins*, 323 U. S. 516, 545.

The law is in part void on the score of vagueness (see *Winters v. New York*, 333 U. S. 507), for subdivision 1 of Section 3 invokes Education Law §3021 which uses the term "treasonable" and "seditious". It is hard to find words of more varied connotation. Surely the legislature

did not use "treasonable" in the limited sense in which it is defined in the United States Constitution, but no other use of the word has any definite meaning whatever. And "seditious", like "subversive" is an epithet directed at any advocacy of far-reaching change.

Subdivision 2 of Section 3 of the Feinberg Law implements Civil Service Law §12a in a manner which raises grave constitutional issues. We are discussing separately the problem raised by the presumption created by the new law. Here we need call attention only to the fact that the earlier law had no general impact on the teaching profession and created no atmosphere of intimidation and interference with the exercise of fundamental rights as is bound to result from the listing machinery set up by the new law.

We cannot, of course, let pass the suggestion of the court below that constitutional rights of free speech may be abridged as a condition of public employment. In support of that statement Judge Lewis cites, among other authorities, the old dictum of Justice Holmes while on the Supreme Judicial Court of Massachusetts (155 Mass. 216 at 220) and the recent decision of this Court in *United Public Workers v. Mitchell* (330 U. S. 75). Neither case is here pertinent, since neither dealt with expression of opinion or the right of association. Both dealt with partisan political activities alone.

Moreover, in *United States v. Thayer*, 209 U. S. 39, Mr. Justice Holmes indicated that his earlier statement was not to be taken literally. For he pointed out (209 U. S. at 42) that even office holders might have constitutional rights the legislature could not restrict. And in the *Mitchell* case the majority opinion recognized that government employees could not be deprived of all freedom (330 U. S. at 100).

The doctrine that unconstitutional limitations may be

imposed on a privilege has long since been abandoned, *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583.

The question, therefore, in each case is whether the restriction imposed on government employees is reasonably calculated to improve government service or whether it is an improper interference with fundamental rights.

We submit that in the case at bar the Court should weigh all the relevant considerations, bearing in mind that no presumption attaches to statutes in the field of freedom of expression. The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed so to teach—the old law adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field, has declared advocate the overthrow of the government by force. The intimidatory impact of such listings has a double aspect. It not only directly affects the organizations listed but it causes persons in the school system to avoid contact with any groups whose ideas might conceivably lead to such listing. Such an interference with freedom of expression and association should be stricken down by this Court.

II. The Presumption Created By the Feinberg Law Is Unreasonable and Denies Due Process of Law

It is well settled that a legislature may not substitute a presumption for proof where there is no reasonable relation between the fact to be proved and the fact presumed: *Bailey v. Alabama*, 219 U. S. 219; *McFarland v. American Sugar Co.*, 241 U. S. 79; *Manley v. Georgia*, 279 U. S. 1; *Tot v. United States*, 319 U. S. 463; *Pollock v. Williams*, 322 U. S. 4. The rule applies to civil as well as

criminal matters: *Mobile, Jackson & Kansas City RR. v. Turnipseed*, 219 U. S. 35.

Section 2 of the Feinberg Law (Education Law §3022, subd. 2) declares that the disqualification specified by Civil Service Law §12a, subd. c. shall be presumed by proof of membership in an organization placed by the Regents on a "subversive" list.

For such a presumption there is no rational basis whatever. Under it a person is presumed disqualified for service in the educational system if he was at one time a member of an organization which the Regents may thereafter declare to be subversive, for the law makes no distinction between past and present membership. There is here no relation at all between the known fact—that is, membership, and the presumed fact—that is, disqualification for office. This is even worse than presumptions which have been struck down—as that of fraud from insolvency in the *Manley* case or of interstate transportation from possession in the *Tot* case.

The presumption here created is wholly unlike those upheld in *People v. Pieri*, 269 N. Y. 315, cited by the Appellate Division in the Second Department (p. 242), and in *People v. Farina*, 290 N. Y. 272, cited by the Third Department (276 App. Div. at 509). In those cases the person charged had special opportunity to know the facts and the prosecution lacked such knowledge (see *Casey v. United States*, 276 U. S. 413 at 418). Moreover, there was a rational connection between the known fact (i. e., possession of contraband) and the presumed fact (i. e., illegal intent).

Here we have none of those elements. Surely the individual teacher has no special knowledge of the character of an organization of which he is said to be a member which justifies putting the burden of going forward with the evidence on him, nor, as we have pointed out, is there any rational relation between the known fact of membership and the presumed fact of disqualification.

Moreover, in all of the cases where presumption statutes have been upheld the facts which gave rise to the presumption were the subject of proof in the criminal proceeding. Here, however, the facts which give rise to the determination that the particular organization is subversive are not to be established at the teacher's hearing. The teacher is thus denied any opportunity of challenging the correctness of those facts.

The arbitrary character of this presumption becomes clear when we consider the predicament of an accused teacher. He has no way of knowing what considerations led the Regents to place on their "subversive" list the particular organization he is accused of having joined—and, under the regulations (pp. 102, 103) he must, at his peril, disaffiliate himself "in good faith" (whatever that means) within ten days after the promulgation of the list! Even if the Regents hold a hearing such hearing is not only ex parte as to the teacher, as pointed out by Judge Hearn (p. 179), but presumably secret.

How can a teacher come forward with evidence to establish that the Regents were wrong? To impose such a burden on him violates all principles of fair play and is a denial of due process.

Moreover, if the accused teacher claims that he is not a member of the organization he is in a double dilemma. He may not want to risk all by resting only on a denial of membership. Yet he may be in no position to ascertain the facts with regard to the character of the organization with which he has been incorrectly linked. On the other hand, familiarity with the character of the organization may be held against his denial of membership. Even where the teacher may admit membership he may still be unable to obtain evidence which might clear the organization. The application of the presumption besets the accused teacher's path with such uncertainty and complication that it must be stricken down.

The court below evidently attempted to save the presumption by interpreting the statute to require proof that the teacher have knowledge of the "subversive" character of the organization. But even so, the presumption remains an unreasonable one. For what will actually happen under such an interpretation? Once an organization has been branded as "subversive" it will no doubt be argued that all persons who were members must have known its character and objectives. Moreover, as the Appellate Division pointed out (p. 240), the listing itself constitutes knowledge of the character of the organization. Thus the case against the teacher is created by the process of judicial lifting of bootstraps. The attempt to justify the presumption by this gloss on the statute is wholly illusory.

The only proper conclusion is that the presumption created by the statute is void. That being so, plaintiffs were entitled to an injunction to prevent all attempts at enforcement of the law.

Cases Believed to Sustain Jurisdiction

Thomas v. Collins, 325 U. S. 516

Said v. New York, 334 U. S. 558

Statement Respecting Opinions

The opinion of the Court of Appeals, a copy of which is hereto annexed, was written by Judge Lewis. The opinion has not yet been reported.

For all the foregoing reasons this appeal should be allowed.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Attorney for Appellants.

OSMOND K. FRAENKEL,
Of Counsel.

APPENDIX "A"

OPINION OF HEARN, J.

(Vol. 122, New York Law Journal, Page 1653, December 15, 1949)

HEARN, J.:

This is an action for a permanent injunction and a judgment declaring unconstitutional chapter 360, Laws of 1949 (commonly known as the Feinberg Law) section 12-a of the Civil Service Law (as implemented by the Feinberg Law) and the Regents' Rules and Commissioner's memorandum promulgated thereunder.

There are three motions before the court—one for a temporary injunction, another for leave to intervene as parties plaintiff and the third, by plaintiffs, for judgment on the pleadings. Since a decision on the third will dispose of all issues, the court will consider it first.

The plaintiffs are a heterogeneous group. Among them are the Teachers Union, other unions, parents, parent-teacher associations, citizens, a social worker, the head of a religious group, teachers and taxpayers. The answer denies that any of them have the right to maintain this action.

There are only two groups of plaintiffs whose claim of a right to sue has substance—the teachers and the taxpayers.

As to the teachers, defendant says there is no justiciable controversy. No list has yet been promulgated by the Board of Regents—hence no teacher has been or can be accused of being a member of a listed subversive organization—in short, no one has been hurt. Plaintiff teachers, however, maintain that they are hurt by the very existence of the law on the books—that they are presently restrained in the exercise of their rights of free speech, free thought and freedom of association because they fear the sanctions contained in the statute—and that "uncertainty, peril and insecurity result from imminent and immediate threats to asserted rights." They say they should be allowed to sue now; that they should not have to wait until a list has been promulgated and then show that by membership in a listed subversive organization they are aggrieved.

Were this an open question the court would be inclined to agree with plaintiffs. If they must violate the law to gain the right to challenge it they risk inevitable discharge from their positions. "To require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadequate, if not wholly illusory, any legal remedy which they may have. Men who must sacrifice their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course is irreparable injury" (United Public Workers v. Mitchell, 330 U. S. 75, dissent by Douglas, J.).

Cogent as this argument may be, the court nevertheless is bound by the ruling of the majority in the above-cited case—and that ruling was that there is no justiciable controversy in a case such as this until the law has first been violated. Accordingly plaintiff teachers have no right to now maintain this action.

The right of the taxpayer plaintiffs presents a different proposition. Section 51 of the General Municipal Law permits a taxpayer to sue to prevent "any illegal act . . . or waste or injury to . . . property, funds or estate of . . . a municipal corporation." Defendant comes within the scope of this section "in so far at least as to authorize an action by a taxpayer to prevent waste of the City's money" (Lewis v. Board of Education, 258 N. Y. 117).

The complaint, among other things, alleges that defendant intends and threatens "to allocate and expend public funds" to effectuate the Feinberg Law; that defendant's imminent acts will cause further substantial waste of public funds; and that enforcement of the law "will involve substantial cost in time, supplies and material." The answer denies these allegations but admits that defendant intends and threatens and has taken steps immediately to effectuate the law.

The court need not ignore common sense and everyday

experience in appraising the pleaded facts. It is self-evident—and defendant, in fact, does not dispute it—that under the law an elaborate system of investigation will be set up (see New York City Superintendent of Schools' proposed order for enforcement of the Feinberg Law, New York Times, September 13, 1949). Moreover, should charges be preferred against any teachers extensive hearings necessarily will be held (see Regents' Rules on Subversive Activities, p. 12). The investigations and hearings will, of course, involve a liberal use of personnel time and consumption of material and supplies bought with public funds. It is worth noting in this connection that the Lusk Law (chap. 666 of the Laws of 1921), which was similar in many respects, carried with it an appropriation for the enforcement expenses of the State Department of Education. It is fair to assume that the enforcement of the law here under consideration likewise will require the expenditure of public funds.

In view of the foregoing the court holds that plaintiff taxpayers have the right to sue. In any event it being vitally important to the public at large and the school system in particular that the real issue herein be speedily determined the court should not "pause to consider whether the question is presented in appropriate proceedings" (Matter of Kuhn v. Curran, 294 N. Y. 207).

Since there are no issues of fact raised by the pleadings the motion for judgment will be considered on the substantive legal issue involved.

The problem posed by these statutes has many facets. Yet essentially they raise but one basic question—How far may the state go in imposing restrictions or conditions on employment as teachers in the public schools?

In seeking to answer this question it should be borne in mind that to impart the principles of democracy, freedom of thought and speech must be preserved in the school setting. The atmosphere must be one which encourages able independent men to enter the teaching profession. To develop good citizens teachers must give students the facts, help them to learn to think and urge them to reach their own conclusions. To so teach, the teacher must himself be

free to think and speak. He must not be under threat of enforced conformity to rigid standards; he must be free of blind censorship; he must be open-minded to new ideas—even when they do not appear to be orthodox. The heart of American education is independent thought. This was best stated in the charge of Judge Medina in the recent trial of *United States v. Foster et al.*; "I charge you that if the defendants did no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas, you must acquit them. For example, it is not unlawful to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence by the prosecution such as the *Communist Manifesto*, *Foundations of Leninism*, and so on. Of course these books are to be found in public libraries and in the libraries of American universities. Indeed, many of our most outstanding and sincere educators have expressed the view that these theories should be widely studied and thoughtfully considered, so that all may thoroughly appreciate their significance and the inevitable effects of putting such theories into practice."

We must also recognize that both state and teacher have dual characters. The state is both employer and government—the teacher both employee and citizen. Hence, the state, like any employer, may impose a condition on employment that bear a reasonable relationship to the duties to be performed (Constitution of State of New York, Art. V, sec. 5). Such condition may be valid even though it impinges upon the basic constitutional right of free speech if it is essential to the integrity of the public service and if the infringement is limited to the necessities of the situation.

But unlike a private employer the state is restricted to a considerable extent both as to the nature of the condition imposed and the manner of its imposition. Thus it may not bar one from public employment because of race, religion or political affiliation (*United Public Workers v. Mitchell*, 330 U. S. 75, 100). Nor may it bar one from public employment, even though the reason be sound, if the method employed constitutes conviction and punishment

without a judicial trial (United States v. Lovett, 328 U. S. 303). No more may the state bar teachers from the schools for even a highly desirable and necessary reason if the method employed violates "due process."

It is particularly needful that we reaffirm and re-emphasize this doctrine at this stage in our history. In this connection it would be well to ponder a passage from The Times of London, written more than a hundred years ago. It appears in "Ordeal by Planning," by John Jewkes. "The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity, and overbearing men tolerated with complacence, springs the tyrannical usage which generations of wise and good men may hereafter perceive and lament in vain. At present, common minds no more see a crushing tyranny in a trivial unfairness or a ludicrous indignity, than the eye uninformed by reason can discern the oak in the acorn, or the utter desolation of winter in the first autumnal fall. Hence the necessity of denouncing with unwearied and even troublesome perseverance a single act of oppression. Let it alone and it stands on record. The country has allowed it and when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compulsion."

"The court well knows that at the present time there are those who would launch a widespread attack on our institutions through the outward appearance of democratic process. They proceed by stealth and in disguise to destroy that which they appear to defend. But 'historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern Securities Co. v. United States, 193 U. S. 197, 400)," nor should they "change their form and content in response to the 'hydraulic pressure' (Holmes, J., *supra*) exerted by great causes."

There is yet another principle by which the court must be guided. A law which intrudes upon freedom of speech, thought, or association comes into court bare of the usual

presumption of validity because of "the preferred place given in our scheme" to these freedoms. And it is the character of the right, not of the limitation, which establishes what standard "shall be used in determining where the individual's freedom ends and the State's power begins" (Thomas v. Collins, 323 U. S., 516).

With these principles clearly in mind—cognizant always that every legal picture must have a moral frame—remembering that "the life of the law is not logic, but experience" (Oliver Wendell Holmes), let us examine the laws and rules here attacked.

It should be noted at the outset that the Feinberg Law is a new administrative statute implementing two older laws (Education Law 3021 and Civil Service Law 12-a). Its provisions merely establish procedures to facilitate enforcement of these two earlier statutes, they being substantive in nature.

Since its provisions refer to hearings and presumptions it may be well here to point out the rules relevant thereto.

Due process ordinarily requires "a fair and open hearing" with "not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (Morgan v. U. S., 304 U. S., 1, 19).

Presumptions may be created by statute only if there is "some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate" (McFarland v. Am. Sugar Co., 241 U. S., 86).

What are these statutes and rules? What do they seek to accomplish? How do they operate?

The Feinberg Law provides, *inter alia*, that the Board of Regents shall promulgate a list of "subversive" organizations after inquiry and "such notice and hearing as may be appropriate." The character and conduct of the hearing thus may be left to the unfettered discretion of the Regents. Under such provision it well may happen that an allegedly subversive organization, after appro-

priate notice to appear at a hearing, defaults, and subsequently is listed by the Regents following an uncontested hearing. If it be assumed, as of course we may, that the Regents will properly enforce the law, such enforcement necessarily would be as follows: Adequate notice of a hearing is given to an organization; a full and proper hearing is had; but no member of the organization was in fact represented at the hearing, such member not having been a party to the proceeding. After the hearing let us further assume that the organization is placed on the list of subversive organizations.

Should the organization or a member wish to challenge this listing it would seem that this could be done in a proceeding pursuant to article 78 of the Civil Practice Act. But in a comparable situation the courts have held that they will not review such administrative action because no justiciable controversy exists (*Joint Anti-Fascist Refugee Committee v. Clark*, 177 Fed., 2d, 79; *Internat. Workers Order v. Clark*, District Court for District of Columbia, McGuire, J., April 12, 1949; *Nat. Council for Soviet Am. Friendship v. Clark*, E. C. A., D. C., not yet reported). A teacher is then charged with membership in the listed organization. At such hearing the organization is deemed to be subversive within the definition of Civil Service Law 12-a even though the finding was by an administrative body and, as to the accused teacher, the supporting evidence was hearsay and he had no opportunity to meet it. In short—the listing, as to him, was *ex parte*.

Is there any reasonable connection under these circumstances between the fact supposedly “proved” and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the government eleven months to establish in the recent trial in the United States District Court (Southern District) between Judge Medina in the case of *United States v. Foster et al.*?

But this presumption as to the character of the organiza-

tion is not the only burden placed upon an accused teacher. The statute is ambiguous as to whether past as well as present membership is proscribed. Though the Regents' Rules interpret it as forbidding only present membership they create a presumption of continuance of past membership "in the absence of a showing that such membership has been terminated *in good faith*." This rule well may be invalid under a constitutional ban on ex post facto legislation (see *Calder v. Bull*, 3 Dall., 386). Aside from this, however, it clearly places upon an accused teacher the oppressive burden of showing his innocence through affirmative proof of something as nebulous and intangible as "good faith"—and this in the face of the inevitable and justifiable skepticism which any realistic hearing officer must have as to the "good faith" of one accused of membership in a subversive organization.

There are yet other inequities in the procedure. A teacher found guilty by the Board of Education has a right of appeal. Education Law 310 gives the right to appeal to the State Commissioner of Education. Education Law, section 2523, gives an alternative right of appeal to the courts in an article 78 proceeding. Civil Service Law 12-a (d) provides for appeal to the courts where disqualification is pursuant to section 12-a. These three sections apparently overlap, and, to some extent, conflict with each other. In the present state of the law there is, to say the least, serious doubt as to whether any one of them exclusively controls and, if so, which—or whether they provide alternate remedies (see *Matter of Nestler v. Board of Examiners*, 192 Misc., 663). If the appeal is taken to the Commissioner of Education (under Education Law 310), that section provides that his determination is *final* and cannot be reviewed by the courts. In such case it is possible that the Regents' listing of an organization and the teacher's disqualification thereunder would constitute conviction and punishment without a judicial trial. If the appeal be taken to the courts in an article 78 proceeding (under Education Law 2523) the court's review might well be "inadequate if not illusory" (*Kirn v. Noyes*, 262 App. Div., 581), since it is but a limited review on the record

alone and the determination could be disturbed only if it had no warrant in the record, no reasonable basis in law and was arbitrary or capricious. It has been the unfortunate tendency of our courts in recent years largely to abdicate their true functions and powers in proceedings to review the determination of administrative bodies, so that today "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Matter of Park East Land Corp'n v. Finkelstein, 299 N. Y., 70, 75). Here too, then, for all practical purposes, the procedure might be tantamount to conviction and punishment without judicial trial.

The teacher seeking to appeal finds himself confronted with still another question: Can he appeal to the courts under Civil Service Law, section 12-a(d), where the disqualification was under the procedure established by the Feinberg Law? The Feinberg Law itself neither contains machinery for appeals nor refers to any other statute in that regard. However, it is part of the Education Law, as are sections 310 and 2523, previously referred to, and these three sections deal exclusively with teachers and administrative personnel of the Department of Education. Civil Service Law 12-a, on the other hand, is a general statute applicable to all civil service employees of the state and city. It seems likely that the appeal statutes dealing specifically with teachers (Education Law 310 and 2523) would control the general statute dealing with all civil service employees (Civil Service Law 12-a) and consequently would bar the right of a teacher to come into court under section 12-a(d).

In short, a teacher discharged under the Feinberg Law would find himself on the horns of a dilemma. If he appeals to the commissioner of education he loses his recourse to the courts; if he starts an article 78 proceeding the court's review (on the record alone) is "inadequate if not illusory"; if he goes into court under Civil Service Law 12-a(d) he probably will be confronted with a court ruling that his proper remedy was under Education Law 310 or 2523—and this at time when, in all likelihood, the statute of limitations already has run on these other remedies.

Finally, an analysis of the Feinberg Law and of Civil Service Law 12-a(c), as implemented, discloses that they unmistakably embody the doctrine of guilt by association, which doctrine has been condemned by the United States Supreme Court (*Schneiderman v. United States*, 320 U. S. 118, 136).

As previously indicated the Feinberg Law is an administrative statute that provides machinery for the enforcement of Civil Service Law 12-a, the latter being substantive in nature. Section 12-a defines the offense—the Feinberg Law provides how its commission may be established.

The following are the offenses defined in section 12-a:

Subdivisions (a) and (b) disqualify teachers who personally advocate violent overthrow of the government by every conceivable form of utterance, oral or written. In short, they cover all forms of *personal* guilt. Consequently, subdivision (c), which disqualifies one who “becomes a member of any society” that advocates the proscribed doctrines, obviously adds another form of guilt—guilt through mere membership in a subversive organization even in the absence of personal guilt. Though personal non-guilt would thus be a defense to a charge made under subdivision (a) or (b), it would be no defense where the charge is mere membership under subdivision (c).

What does the Feinberg Law provide as to how a charge of membership in a subversive organization [under section 12-a(c)] shall be proved? It first directs the Board of Regents to promulgate a list of organizations which advocate the doctrines prohibited by section 12-a. It then provides that membership in “any such organization included in such listing” shall constitute *prima facie* evidence of disqualification. Disqualification for what offense? Obviously for membership in an organization that advocates violent overthrow of the government. But this offense [defined in section 12-a(c)] has only two elements—membership in an organization and advocacy by the organization of violent overthrow of the government. The first element, membership, must be established by direct proof. The second, advocacy by the organization of the proscribed doctrine, is established *prima facie* by the fact that the organi-

zation has been listed by the Board of Regents—the intention of the Legislature, of course, being to obviate the need for a protracted trial each time a teacher is accused of membership under section 12-a(c). The two together make out a complete case against the teacher. Should the teacher defend, what defenses may he interpose? Only the same two that he could formerly interpose to a charge under section 12-a(c) alone—either his non-membership or the organization's non-advocacy of proscribed doctrines. For the offense with which he is charged, under Feinberg Law procedures, is still a violation of section 12-a(c)—membership in an organization that advocates violent overthrow of the government. Here, again, then personal non-guilt is no defense since the charge is still mere membership even though the administrative procedure employed is that set out in the Feinberg Law. What this constitutes, of course, is the finding of guilt from mere association without proof of personal guilt.

That this may not be done under our law is clear.

In the court's charge to the jury in the case of *United States v. Foster et al.*, which involved a prosecution under a comparable statute, Judge Medina said: "Under our system of law, guilt is purely personal and you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party, no matter what you find were the principles and doctrines which were taught or advocated by that party." This has been the most recent reiteration of the established principle that: "Under our traditions beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles" (*Schneiderman v. United States*, 320 U. S., 118, 136; see also "Loyalty Tests and Guilt by Association," 61 *Harv. L. Rev.* 592, John Lord O'Brien).

The cumulative effect of the procedure as outlined then is this: At an "appropriate" hearing by the Board of Regents (an administrative body) an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hear-

ing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire prima facie case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's non-reviewable hearing and finding which was ex parte and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination "in good faith." Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilty from mere membership, without any proof of personal guilt—the teacher's personal non-guilt in fact being irrelevant where the only charge is membership.

It does not appear to this court that these procedures add up to "those fundamental requirements of fairness which are of the essence of due process" (*Morgan v. United States*, 304 U. S., 1, 19).

Consequently subdivision (c) of Civil Service Law 12-a (as implemented by the Feinberg Law), section 2 of Education Law 3022 (Feinberg Law) and the Regents' Rules promulgated thereunder are unconstitutional under the due process clause of the Fourteenth Amendment.

In so holding it may be observed that the foregoing determination in no way impairs the power of the Board of Regents, under the other adequate provisions of existing law, to promulgate and enforce reasonable rules and regulations designed to rid the school system of teachers found to be unfit.

In view of this determination, the motion to intervene is denied and the motion for a temporary injunction is not passed upon.

Judgment upon the pleadings is granted to plaintiffs to the extent indicated. Submit orders and judgment accordingly.

APPENDIX "B"

OPINION OF APPELLATE DIVISION

SUPREME COURT, APPELLATE DIVISION—SECOND JUDICIAL
DEPARTMENT

NOLAN, P. J., CARSWELL, SNEED, WENZEL and MACCRATE, JJ.

ABRAHAM LEDEKMAN, as President of TEACHERS UNION OF
THE CITY OF NEW YORK, Local 555 of the United Public
Workers and others, Plaintiffs,

and

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN,
DAVE TIGER and EDITH TIGER, Plaintiffs-Respondents,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellant

Appeal from so much of a judgment of the Supreme Court reported in ; entered December 21, 1949, in Kings County, in accordance with an order of the court at Special Term, which granted a motion as to certain plaintiffs, under Rule 112, Rules of Civil Practice, for judgment on the pleadings, declaring section 12-a, subdivision (c), Civil Service Law, as implemented by Laws of 1949, Chapter 360, and section 3022, subdivision 2, Education Law, and chapter XV-B, section 254, of the Rules of the Board of Regents, to be unconstitutional, and granted other relief.

John P. McGrath, Corporation Counsel (Seymour B. Quel, Michael A. Castaldi and Morris Weissberg with him on the brief), for appellant.

Harold I. Cammer for respondents.

John P. Walsh and others for Kings County Committee of the American Legion, amicus curiae.

Paul O'Dwyer and others for New York City Chapter of the National Lawyers Guild, amicus curiae.

Arthur C. Buck and others for Association of Teachers of the Social Studies in the City of New York, *amici curiae*.

R. Lawrence Siegel, and others for American Civil Liberties Union, *amici curiae*.

CARSWELL, J.:

We are required to pass upon the constitutionality of two statutes. One is section 12-a, subdivision (c), of the Civil Service Law, and the other is section 3022 of the Education Law (L. 1949; ch. 360), the so-called "Feinberg Law." The former bans organizing a society or group advocating the overthrow of the State or National government by force, as well as membership therein. The latter implements Civil Service Law, section 12-a, in respect of its enforcement and, *inter alia*, provides for the removal of superintendents, teachers and employees in the educational system who continue as members of subversive organizations.

We may not pass upon the validity of administrative action thereunder or Regents' rules adopted pursuant thereto; such issues are not justiciable in this action.

The principles to which recourse must be had to resolve the contentions respecting the validity of the challenged statutes are elementary. The application of these principles does not present a novel or unique problem. These principles, and the reasoning vindicating them, have been the subject of prolix exposition in opinions without number. Consequently, after a thorough analysis of the arguments advanced and the cases invoked, both relevant and irrelevant, it will suffice merely to state our determinative conclusions on the pertinent or decisive contentions pressed upon us.

(1) The wisdom or unwisdom of the challenged statutes and the propriety of their enactment presents a legislative and not a judicial problem.

(2) The offenses defined in section 12-a, Civil Service Law, are crimes under section 161, Penal Law, and Title 18, United States Code, section 2385. These latter enactments have been held to be constitutional. (*Gillow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *Dunne*

v. *United States*, 138 F. 2d 137, certiorari denied 320 U. S. 790.) Hence, section 12-a, subdivision (c), Civil Service Law, is valid.

It is patently within the power of the Legislature, to promote the general welfare and protect the public service, to provide, as a reasonable condition governing public employment, that upon the commission of certain offenses described in section 12-a, Civil Service Law, public employment shall be discontinued. A constitutional right of free speech may be abridged as a condition to the enjoyment of public employment. One does not have a constitutional right to be a public employee except upon compliance with reasonable conditions imposed upon all, or imposed under reasonable classifications. (*United Public Workers v. Mitchell*, 330 U. S. 75; *McAuliffe v. New Bedford*, 155 Mass. 216; *People ex rel. Clifford v. Scannell*, 74 App. Div. 406, affd. on opinion below, 173 N. Y. 606; *Friedman v. Schwelbenbach*, 159 F. 2d 22, certiorari denied 330 U. S. 838; *Washington v. Clark*, 84 Fed. Supp. 964; *Pawell v. Unemployment Compensation Bd. of Review*, 146 Pa. Superior Ct. 147; *Matter of Rabouine v. McNamara*, 275 App. Div. 1052; *People v. American Socialist Society*, 202 App. Div. 640.) The condition here imposed and the classification made are reasonable.

(3) A finding pursuant to the statute (§3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under section 3022, subdivision 2, Education Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member-employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The dis-

qualification referred to in section 12-a, subdivision (c), in respect to membership by an employee in a described organization means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, §12-a, subd. d.) The statute is prospective in operation and conforms with due process of law. (*Morgan v. United States*, 304 U. S. 1, 15; *Tot v. United States*, 319 U. S. 463, 467; *Casey v. United States*, 276 U. S. 413, 418; *Manley v. Georgia*, 279 U. S. 1, 6; *People v. Pieri*, 269 N.Y. 315, 324; *People ex rel. Beardsley v. Barber*, 266 App. Div. 371, affd. 293 N. Y. 706.)

(4) The contention that the statute (L. 1949, ch. 360; Education Law, § 3022) is a bill of attainder and, therefore, invalid, is without merit. It is predicated upon language in the preamble thereto and not contained in the statute. It is unsound and irrelevant to an inquiry as to the validity of the statute. It is long settled doctrine that such a preamble is not part of a statute. Recourse to a preamble is permissible only when ambiguity is to be resolved, or statutory language interpreted. (*Neumann v. City of New York*, 137 App. Div. 55, 59; *Westchester County S. P. C. A. v. Mengel*, 266 App. Div. 151, 155, affd. 292 N. Y. 121; *Pumpelly v. Village of Owego*, 45 How. Pr. 219; *Goodell v. Jackson*, 20 Johns. 693, 722.)

Irrespective of references in the preamble to the Communist Party and its affiliated organizations, section 3022, Education Law, provides for a finding, after a hearing on notice, as to all organizations. The provisions of the statute and not the references in the preamble are determinative.

The challenged statutes are constitutional.

(5) The validity of the rule of the Board of Regents need not be considered. No list has as yet been published, and any rule may be withdrawn and substituted prior to its practical application. Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby. (*Bandini Co. v. Superior Court*, 284 U. S. 8, 22; *Town of Pierrepont v. Loveless*, 72 N. Y. 211, 216.)

(6) The allegations in the complaint with respect to proposed expenditures by the defendant are expressly denied in the answer. This issue of fact precludes the granting of a judgment on the pleadings in favor of the plaintiffs.

The judgment, in so far as appealed from should be reversed on the law, with \$10 costs and disbursements, the motion for judgment on the pleadings denied, with \$10 costs, and the complaint dismissed, under Rule 112, Rules of Civil Practice, with costs.

APPENDIX "C"

THOMPSON

vs.

WALLIN

[301 N. Y. 476]

STATEMENT OF CASE

November, 1950

ROBERT THOMPSON, as Chairman of the Communist Party of the State of New York, et al., *Appellants*,

v.

WILLIAM J. WALLIN et al., Constituting the Board of Regents of the University of the State of New York, *Respondents*

In the Matter of CHARLES L'HOMMEDIEU et al., *Appellants*,
against BOARD OF REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK et al., *Respondents*

ABRAHAM LEDERMAN, as President of Teachers Union of the City of New York, Local 555 of the United Public Workers, et al., *Plaintiffs*, and IRVING ADLER et al., *Appellants*, v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, *Respondent*

Decided November 30, 1950.

APPEAL, in the first above-entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon

an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the court at Special Term (Shirick, J.; opinion 196 Misc. 686), granting a motion by plaintiffs for judgment on the pleadings declaring unconstitutional chapter 360 of the Laws of 1949 (2) declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

APPEAL, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court at Special Term (Shirick, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division directed a dismissal of the petition.

APPEAL, in the third above-entitled action, from a judgment in favor of defendant, entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (Hearn, J.; Opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (A) declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (B) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and Bernard Jaffe for appellants in first above-entitled action.

Samuel M. Birnbaum and *Solomon Kreitman* for American Legion Department of New York, *amicus curiae*, in support of respondents' position in first above-entitled action. *Frederic A. Johnson*, *Osmond K. Fraenkel*, *Fred G. Moritt* and *Morris Eisenstein* for Appellants in second above-entitled proceeding.

Nathaniel L. Goldstein, *Attorney-General* (*Wendell P. Brown* and *Ruth Kessler Toch* of Counsel) for Respondents in second above-entitled proceeding.

Arthur Garfield Hays and *Osmond K. Fraenkel* for Appellants in third above-entitled action.

John P. McGrath, *Corporation Counsel* (*Michael A. Castaldi*, *Seymour B. Quel* and *Morris Weissberg* of counsel), for respondent in third above-entitled action.

LEWIS, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360), commonly known, and hereinafter referred to as the *Feinberg Law*.

* The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

Thompson et al. v. Wallin et al. (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the *Feinberg Law* unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Hommedieu et al. v. Board of Regents et al. (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949 [*Feinberg Law*], and to cease and desist from taking any steps toward the enforcement of the provisions of said law . . . and to treat said enactment as a nullity . . ." At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

* *Lederman v. Board of Education of City of New York* (276 App.

At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

“§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.”

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

“12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word

Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. “At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

“(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

“(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

“(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.”

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

“Section 1. The legislature hereby finds and declares that

there is common report that members of the subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to

meet this grave menace and to report thereon regularly to the state legislature.” *

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

“ § 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

“2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may

* Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purpose of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance herewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn. v. Douds*, 339 U. S. 382, 400-401; *People v. Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for the appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*)

—an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers v. Mitchell*, 330 U. S. 75, 100;

American Communications Assn. v. Douds, *supra*, p. 405; *New York ex rel. Bryant v. Zimmermann*, 278 U. S. 63, 72-73; *Patson v. Pennsylvania*, 232 U. S. 138, 144; *Hawker v. New York*, 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge Holmes—as he then was—to write in *McAuliffe v. Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the *Feinberg Law*, is incompatible with freedoms guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preservation. We are also aware that those freedoms do not sanction unbridled license. (*People v. Gitlow*, 234 N. Y. 132, 137, *affd. sub nom. Gitlow v. New York*, 268 U. S. 652-666-667; *Schenck v. United States*, 249 U. S. 47, 52.) Indeed “ . . . it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts.” (*American Communications Assn. v. Douds, et al. supra*, p. 394.) When *People v. Gitlow* (*supra*), reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

“It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents

the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case* [254 U. S. 325], that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. * * * It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. * * * In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied." (Emphasis supplied.) (See, also, *Cox v. New Hampshire*, 312 U. S. 569, 674; *Gilbert v. Minnesota*, 254 U. S. 325, 332, 339; *Schenck v. United*

States, supra, p. 52; *Fox v. Washington*, 236 U. S. 273, 276-277; *Patterson v. Colorado*, 205 U. S. 454; 462; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 294; *Robertson v. Baldwin*, 165 U. S. 275, 281; *People v. Most*, 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which threatened the well-being of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislature has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." (*Whitney v. California*, 274 U. S. 357, 371.) Paraphrasing what was written in *Gitlow v. New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency."

Whether that danger was "clear and present"—within the rule of *Schenck v. United States* (*supra*, p. 52) as interpreted and applied in *American Communications Assn. v. Douds* (*supra*, pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years

by those who teach them and to whom the children look for guidance, authority and leadership; and that members of such groups frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

A bill of attainder has been defined as " . . . a legislative act which inflicts punishment without a judicial trial." (*Cummings v. Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly v. Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions of the Feinberg Law — section 3022 — in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subver-

sive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn. v. Douds*, *supra*, pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "after inquiry, and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts v. Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case . . . remains only so long as there is no substantial evidence

to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

LOUGHRAN, Ch. J., CONWAY, DESMOND, DYE, FULD and
FROESSEL, JJ., concur.

Judgment accordingly.

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CHARLES TEMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

4

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRINGER, WILLIAM NEWMAN,
DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPELLANTS' BRIEF

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
Attorneys for Appellants.

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Opinions Below

Three opinions have been written in this case. At Special Term Mr. Justice Hearn accepted the contentions advanced by plaintiffs, appellants here, that the challenged laws and regulations violated the due process clause of the Fourteenth Amendment. That opinion is reported in 196 Misc. (N. Y.) 873.

In the Appellate Division, where the judgment in favor of plaintiffs was reversed, and their complaint dismissed, an opinion was written by Mr. Justice Carls. It is reported in 276 App. Div. (N. Y.) 527. In the Court of Appeals, which affirmed the judgment of dismissal, the opinion was written by Judge Lewis. It is reported in 301 N. Y. 476.

Statement of Jurisdiction.

This Court has jurisdiction under Title 28 U. S. C. § 1257, this being an appeal from a final judgment of the

highest court of a state which has upheld a statute against a challenge that it was repugnant to the United States Constitution. The decision was rendered on November 30, 1950 (54). Application for appeal was presented on January 16, 1951. It was allowed on January 17, 1951 (72). This Court noted probable jurisdiction on June 4, 1951 (75).

The Statutes Involved

Appellants challenge the so-called Feinberg Law, Chapter 360 of the Laws of 1949 of New York, which enacted Education Law § 3022 and which implemented Education Law § 3021 and Civil Service Law § 12a, and also the rules of the Board of Regents adopted in accordance with the Feinberg Law. All of these statutes and rules, as well as a memorandum by the Commissioner of Education interpreting them, were set forth in full as exhibits annexed to the complaint herein (20-33). The essential portions are reprinted as Appendix A to this brief.

Statement of the Case

The issues in this case were presented to the state court by a motion for judgment on the pleadings made by plaintiffs (4, 5). The pleadings consisted of a complaint (5-19) and an answer (33-35). The complaint sought a declaration that Chapter 360 of the Laws of 1949, commonly known as the Feinberg Law, was unconstitutional and that the rules prepared to implement it and Civil Service Law § 12a, as so implemented, were likewise unconstitutional (19).

The action was originally brought by various groups of plaintiffs, the Teachers Union, individuals who were only teachers and others who were both teachers and taxpayers, as well as some who were parents and others who were connected with various organizations (5-8). At Special

Term the complaint was dismissed as to all those who were not taxpayers (35-37). It survives in this Court, therefore, only as to those plaintiffs-taxpayers whose names are set forth in the caption.

The complaint attacks the laws and the regulations issued thereunder as violating the Fourteenth Amendment to the United States Constitution in various respects (12-18).

This case was one of three brought by various persons to test the law. The Court of Appeals wrote a single opinion covering all the cases, in which it expressly passed upon and rejected the contention of plaintiffs in this case that the statute denied due process under the Fourteenth Amendment (61-68).

The opinion of the Court of Appeals thus construed the statute to permit the Board of Regents to promulgate lists of allegedly subversive organizations and permit the educational authorities on the basis of such lists to declare employees in the educational system (both teachers and non-teachers) to be prima facie disqualified from continuing to hold their positions merely because of membership in any such organizations.

Questions Presented

1. The statutes and the regulations issued thereunder have the effect of disqualifying persons from employment as teachers or from other employment in connection with the educational facilities of the state and its subdivisions merely because of membership in an organization alleged to be subversive. In so doing they interfere with freedom of speech and of assembly guaranteed to all persons against state action by the due process clause of the Fourteenth Amendment.

2. The statutes and the regulations issued thereunder create an unreasonable presumption which denies due

process of law as guaranteed by the Fourteenth Amendment.

3. The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness.

Specification of Error

The New York Court of Appeals erred in affirming the judgment dismissing plaintiffs' complaint and in affirming the reversal of the judgment in plaintiffs' favor.

ARGUMENT

POINT I

The laws and regulations issued thereunder constitute an abridgement of freedom of speech and of assembly.

At the outset we must challenge the suggestion of the Court below (62) that constitutional rights of free speech may be abridged as a condition of public employment. In support of that statement Judge Lewis cited, among other authorities, the old dictum of Mr. Justice Holmes while on the Supreme Judicial Court of Massachusetts (*McAuliffe v. Mayor*, 155 Mass. 216 at 220) and the recent decision of this Court in *United Public Workers v. Mitchell* (330 U. S. 75). Neither case is here pertinent, since neither dealt with expression of opinion or the right of association. Both dealt with partisan political activities alone.

Moreover, in *United States v. Thayer*, 209 U. S. 39, Mr. Justice Holmes indicated that his earlier statement was not to be taken literally. For he pointed out (209 U. S. at 42) that even officeholders might have constitutional rights the legislature could not restrict. And in the *Mit-*

chell case the majority opinion recognized that government employees could not be deprived of all freedom of activity (330 U. S. at 100).

In *United States v. Lovett*, 328 U. S. 303, government employees were held entitled to the protection of the prohibition against bills of attainder. And in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, Justices Black, Douglas, Jackson and Frankfurter, in their various concurring opinions, recognized that the Constitution imposes some limitations on the power of Congress even when dealing with government employees. This point of view has perhaps been most eloquently expressed by Judge Edgerton in his dissent in *Bailey v. Richardson*, 182 F. (2d) 46, 66 ff (here affirmed by an evenly divided court, 341 U. S. 918).

Finally, in *Garner v. Los Angeles*, 341 U. S. 716 at 725, Mr. Justice Frankfurter expressly stated the problem as follows:

"But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority, nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem."

So, here, this Court must look at the objectives of the challenged legislation and its impact on freedom. The question in each case is whether the restriction imposed on government employees has reasonable relation to the public service, or constitutes an improper interference with fundamental rights. New York's old provision, Civil Service Law § 12a, which disqualifies employees who belong to

organizations which in fact advocate the overthrow of the government by force, is of the character of the charter amendment held valid in the *Garner* case. But the new legislation here under attack is of an entirely different character.

For Education Law § 3022 (31, 32) and the regulations issued by the Board of Regents necessarily restrict the liberties of all persons in the teaching service (22-25). The regulations in effect command all such persons to sever relations with any organization listed by the Regents within ten days on pain of loss of position (23, 24). And this, regardless of the correctness of the list, of the pendency of judicial proceedings to review a particular listing. And it is no answer to say that if the Regents should be overruled in some instances, persons who were members of such organizations would not be penalized. The risk they run is too great to condone the interference with freedom of association.

Aside from this particular incidence of the regulations, there can be no doubt of the restrictive effect of the entire scheme on our cherished liberties. Such attempts at restriction are, of course, not new in our national life. After the First World War fear of the then recent Soviet Revolution led to the enactment of similar legislation, known as the Lusk Laws (Laws of 1921, Ch. 666). So eminent a patriot as Alfred E. Smith had vetoed this legislation when first passed in 1920. And he led the fight for repeal a few years later. He said as he signed the repealer:

"The Lusk Laws . . . are repugnant to the fundamentals of American Democracy . . . Teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to governmental matters deemed by the state officer consistent with loyalty . . . Freedom of opinion and freedom of speech were by these laws unduly shackled and an unjust discrimination was made against the members of a great profession. In signing these bills I firmly believe I am vindicating the principle that within the limits of the penal law every citizen may speak and teach what

he believes" (School and Society, XVII [June 9, 1923], 635).

Similar consequences flow from the impact of the program devised by the new legislation on teachers generally as well as on particular individuals who might be brought up on charges. For laws such as these create fear and timidity wholly incompatible with the intellectual atmosphere in which teachers should live. They will become afraid to join movements or express views which might be challenged lest they be caught in the dragnet of the Regents' lists.

That this is no idle apprehension is established by the various surveys which have recently been made of the status of academic freedom. At about the time the Feinberg Law was enacted, The American Scholar published articles dealing with the situation which had developed at the University of Washington in the fall of 1948. Those by Max Lerner (pp. 337-320) and Helen M. Lynd (pp. 346-353) foretold the threats to freedom which later surveys have laid bare.

The New York Times this year instituted a survey of freedom of thought and speech in the colleges and reported that it was being "stifled by students' fear of red label" (N. Y. Times, May 10, 1951, pp. 1, 28; May 11, 1951, pp. 29, 48).

In its issue of June 19, 1951, The Harvard Crimson in its third annual report on the subject gave the details of 35 academic freedom cases which had arisen in various parts of the country. Later, the National Education Association, warning of growing censorship in the schools in an 86-page report, noted that teachers were afraid to teach almost any controversial subject (N. Y. Times, July 6, 1951, p. 25; cf. editorial, July 9, 1951). Pertinent excerpts from these various publications are included in Appendix B to this brief.

Mr. Justice Frankfurter has recognized the restrictive effect of regulations of the character here involved in the

Garner case, *supra*, where he said at pp. 727, 728, speaking there of an oath required of municipal employees that they had not belonged to organizations which advocated the overthrow of the Government by force:

" * * * It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested by 'joining'. See Arthur M. Schlesinger, Sr., *Biography of a Nation of Joiners*, published in 50 *American Historical Review* 1, reprinted in Schlesinger, *Paths to the Present* 23."

It is, of course, true that a majority of this Court upheld the power of Los Angeles to exact the oath there in question. But we submit that decision does not rule this case. This Court, indeed, must have so believed, else it would not have noted probable jurisdiction in this case on the same day that it decided the other.

The difference between the cases, we suggest, rests in this: In the Los Angeles case the employees were asked to certify that they had not *knowingly* (we stress this Court's interpolation of that condition into the oath) belonged to any organization which in fact advocated the overthrow of the government by force. Here employees are declared disqualified if they continue to belong to an organization which has merely been declared to have that character by an administrative body. In the other case persons were disqualified only if they actually belonged to such an organization and were aware of its character. Here the employees are bound to accept as true the char-

acterization of the organization by the Regents or, at their peril, prove that such characterization was false. There can be no comparison about the difference in impact on freedom of association.

We are, in effect, here dealing with machinery which is bound to create an atmosphere of intimidation and to interfere with the exercise of fundamental rights.

The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed to teach—the old law (Civil Service Law § 12a) adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field, has declared advocate the overthrow of the government by force. The intimidatory impact of such listings has a double aspect. It not only directly affects the organizations listed but it causes persons in the school system to avoid contact with any groups whose ideas might conceivably lead to such listing. Such an interference with freedom of expression and association should be stricken down by this Court.

POINT II

The presumption created by the Feinberg Law is unreasonable and denies due process of law.

A legislature may not substitute a presumption for proof where there is no reasonable relation between the fact to be proved and the fact presumed: *Bailey v. Alabama*, 219 U. S. 219; *McFarland v. American Sugar Co.*, 241 U. S. 79; *Manley v. Georgia*, 279 U. S. 1; *Tot v. United States*, 319 U. S. 463; *Pollock v. Williams*, 322 U. S. 4. The rule applies to civil as well as criminal matters; *Mobile, Jackson & Kansas City RR. v. Turnipseed*, 219 U. S. 35.

Section 2 of the Feinberg Law (Education Law § 3022, subd. 2) declares that the disqualification specified by

Civil Service Law § 12a, subd. c shall be presumed by proof of membership in an organization placed by the Regents on a "subversive" list (31).

For such a presumption there is no rational basis. Under it a person is presumed disqualified for service in the educational system if he was at one time a member of an organization which the Regents may thereafter declare to be subversive, for the law makes no distinction between past and present membership. There is here no relation at all between the known fact—that is, membership, and the presumed fact—that is, disqualification for office. This is even worse than presumptions which have been struck down—as that of fraud from insolvency in the *Manley* case or of interstate transportation from possession in the *Tot* case.

The presumption here created is wholly unlike those upheld in *People v. Pieri*, 269 N. Y. 315, cited by the Appellate Division in this case, and in *People v. Farina*, 290 N. Y. 272, cited by the Appellate Division in the companion case (276 App. Div. at 509). In those cases the person charged had special opportunity to know the facts and the prosecution lacked such knowledge (see *Casey v. United States*, 276 U. S. 413 at 418). Moreover, there was a rational connection between the known fact (i.e., possession of contraband) and the presumed fact (i.e., illegal intent).

Here we have none of those elements. Surely the individual employee has no special knowledge of the character of an organization of which he is said to be a member which justifies putting the burden of going forward with the evidence on him, nor, as we have pointed out, is there any rational relation between the known fact of membership and the presumed fact of disqualification.

Moreover, in all of the cases in which presumption statutes have been upheld the facts which gave rise to the presumption were the subject of proof in the criminal proceeding. Here, however, the facts which give rise to the determination that the particular organization is sub-

versive are to be established in a proceeding in which the employee will have had no part whatever.

The arbitrary character of this presumption becomes clear when we consider the predicament of an accused employee. He has no way of knowing what considerations led the Regents to place on their "subversive" list the particular organization he is accused of having joined—and, under the regulations he must, at his peril, disaffiliate himself "in good faith" (whatever that means) within ten days after the promulgation of the list! Even if the Regents should hold a hearing such hearing is not only ex parte as to the employee, as pointed out at Special Term by Judge Hearn (45), but presumably secret as well.

How can an employee come forward with evidence to establish that the Regents were wrong? To impose such a burden on him violates all principles of fair play and is a denial of due process.

Moreover, if the accused person claims that he is not a member of the organization he is in a double dilemma. He may not want to risk all by resting only on a denial of membership. Yet he may be in no position to ascertain the facts with regard to the character of the organization with which he has been incorrectly linked. On the other hand familiarity with the character of the organization may be held against his denial of membership. Even where the employee may admit membership he may still be unable to obtain evidence which might clear the organization. The application of the presumption besets the accused's path with such uncertainty and complication that it must be stricken down.

The Appellate Division evidently attempted to save the presumption by interpreting the statute to require proof that the employee have knowledge of the "subversive" character of the organization (53). But even so, the presumption remains an unreasonable one. For what will actually happen under such an interpretation? Once an organization has been branded as "subversive" it will no doubt be argued that all persons who were members must

have known its character and objectives. Moreover, as the Appellate Division pointed out (52), the listing itself constitutes knowledge of the character of the organization and continuation of membership thus concludes the employee. Thus the case against him is created by the process of judicial lifting of bootstraps. The attempt to justify the presumption by this gloss on the statute is wholly illusory.

The only proper conclusion is that the presumption created by the statute is void. That being so, plaintiffs were entitled to an injunction to prevent all attempts at enforcement of the law.

POINT III

The law is void because of vagueness.

Education Law § 3022, in its first subdivision, requires the Regents to adopt rules for the disqualification of employees who violate § 3021. This latter section requires the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" (32). The Feinberg Law in its first section speaks also of "subversive" propaganda (30). And the Rules of the Regents are headed "Subversive Activities" (22).

The regulations issued by the Regents, in an endeavor to implement this provision, require annual reports in writing on every employee (including the supervisors themselves) to indicate whether there is any evidence that such employee has violated § 3021 (22).

The Commissioner of Education in a memorandum explaining these regulations (as appears from the copy attached to the complaint (25-29)) described "subversive activity" as including the utterance of "any treasonable or seditious word" and went on to say:

" . . . It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed

by others all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children" (27).

While the Commissioner sought to warn the school authorities against treating suggestions for improving our institutions as subversive, he made no attempt to define the words of the statute.

We submit these words are so vague that their use condemns the whole scheme on the score of vagueness (Cf. *Musser v. Utah*, 333 U. S. 95; *Winters v. New York*, 333 U. S. 507).

Neither the word "seditious" nor the word "treasonable" has acquired any such legal meaning as, for instance, the word "obscene"—or even the phrase "moral turpitude" (see *Jordan v. deGeorge*, 341 U. S. 223—but note the dissenting opinion of Mr. Justice Jackson, concurred in by Justices Black and Frankfurter).

Throughout history the epithets "seditious" and "subversive", have been hurled at those who challenged the established order. It was experience with prosecutions for "seditious" libel, both in England and in the Colonies (culminating in the great victory for Freedom in Peter Zenger's case) which, in part, led to the adoption of the First Amendment.

And the vagueness of the term "treason" resulted in the precise definition contained in the Constitution (a definition obviously not carried over into the New York statute). As Madison recognized in Federalist Paper No. 42 (as quoted by Mr. Justice Black in the *Joint Anti-Fascist* case 341 U. S. 123, 144, note 2:

" . . . But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the Convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a Constitutional definition of the crime, fixing the proof neces-

sary for conviction of it, and restraining the Congress, even in punishing it from extending the consequences of guilt beyond the person of its author."

Prophetically, indeed, Mr. Justice Reed, in the *Winters* case, supra, at page 518, warned that a case might arise calling for decision "as to free expression of political views in the light of a statute intended to punish subversive activities".

Surely the educational authorities of New York should not be permitted to engage in witch hunts against teachers and other employees to label them as "seditious" or "treasonable" and subject them to the public obloquy which will result and require them to stand trial for an offense which is incapable of definition. Section 3021 and the new law, insofar as it rests on this older one, should be declared unconstitutional.

CONCLUSION

The most serious threat to our freedom today is the trend toward conformity resulting from the variety of pressures, both governmental and private, of which the legislation here under attack is one. The serious effects of these pressures on the teaching profession has, as we have shown, become alarming. While it is too much to hope that decisions of this Court alone can stop this disturbing trend, such decisions can, at least, mark bounds beyond which restrictions cannot go. Moreover, the opinions of this Court can help reshape the times. It has happened so before, it can happen again. Here is an opportunity to speak out in the name of freedom, to still the voices of fear that would repress. The judgment appealed from should be reversed and the judgment entered at Special Term reinstated.

Respectfully submitted

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
Attorneys for Appellants.

APPENDIX A

CHAPTER 360, LAWS OF 1949

SECTION 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violent or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be vigorously enforced. The legislature de-

the Fourteenth) rests on the impact of the law on the many, not on its impact on the few. And that, after all, is the real reason for the First Amendment (see Chafee, *Freedom of Speech in the United States*, 33-35).

Of course, the Feinberg Law does not, by its language, restrict freedom of speech and of assembly. But it can hardly be doubted that it would do so were it to be allowed to become effective. That the promulgation of lists such as is here envisaged produces an atmosphere of fear that is hostile to freedom—indeed to security itself in its making public employment less attractive to persons of independent thinking—has been noted by almost all the writers on the subject (see Gellhorn, *Security, Loyalty & Science*; Biddle, *The Fear of Freedom*; *Civil Liberties Under Attack*).

This is the first time this Court has been called upon to meet this issue, for in all the earlier cases the Court was concerned only with the impact of the challenged law or regulation upon a particular individual or organization. Fortunately New York has a practice whereby a taxpayer may challenge a law involving the expenditure of monies on constitutional grounds, regardless of its direct effect upon him. So this Court has an opportunity of dispelling the mists of fear that have enshrouded us. To strike down the Feinberg Law will in no way prevent dismissal of teachers who really are disqualified; it will prevent one more attempt to intimidate a large group of public servants into orthodoxy.

2. In discussing the fairness of the procedures set up under the Feinberg Law, appellee, we submit, has reached some strange conclusions.

a. In the first place, appellee maintains (p. 24) that listing by the Board of Regents was a necessary step because of the difficulty involved in having the several thousand school districts of the state ascertain the character of the organizations which might come within the definition of the law. With that argument we have some

sympathy. It would justify an arrangement whereby some central agency might make the necessary investigation and provide a school board with the data on which to base charges of disqualification. It does not justify the creation of any presumption. Indeed, the very argument made by appellee as to the difficulty confronting the local school board destroys the argument later made (p. 26) that the presumption is fair because it disappears if the employee submits "substantial" evidence that the organization is not of the character condemned by the law. Why the individual teacher is supposed to be able to do what the local board cannot is hard to fathom.

b. Appellee criticizes our comments on the procedures by suggesting (p. 27) that the evidence presented at the public hearing before the Regents may be studied as a basis for each individual's judgment whether to remain a member or resign. But if the Board continues in the manner in which it began there will be nothing to study. For on that occasion, while the Board gave the representatives of certain organizations an opportunity to submit affidavits, file briefs and give oral argument, no "evidence" as to the "subversive" character of any of the organizations was submitted other than a statement that the Attorney General had listed them as subversive within the definition of the law (see Jurisdictional Statement in No. 312, pp. 9, 10, 18, 19). We submit that it is still true that an employee has no way of knowing what considerations led the Board to list the particular organization (see main brief, p. 11).

Both appellee (pp. 10, 27) and amicus (A. G. p. 12) stress the supposed right of an organization listed by the Regents to review their determination in a proceeding under Article 78 of the New York Civil Practice Act. But such review cannot deal with the basic issue—the character of the organization. If there is conflict in the evidence, the administrative determination cannot be reviewed by the courts: *Matter of Miller v. Kling*, 291 N. Y. 65; *Matter*

of *Tompkins v. Board of Regents*, 299 N. Y. 469; *Matter of Joseph Burstyn, Inc. v. Wilson*, 303 N. Y. 242.

c. Appellee (pp. 28-33) tries to justify the presumption provision of the statute by breaking it into two parts: 1. The character of the organization; 2. The employee's knowledge of that character. Actually the attempted analysis demonstrates what a hollow sham the presumption is.

A difficulty, however, with appellee's argument on the first aspect of the "presumption" is that in the instances cited (pp. 29; 30) the administrative determination was made by experts with regard to matters within their competence and which did not impinge on freedom of expression. Here we have a statute giving the Board of Regents power to pass on something having nothing to do with matters of educational policy concerning which they are supposed to be experts, and something which closely impinges on freedom of expression—an "evil type of censorship" (see Mr. Justice Black, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. at 143).

But even if we assume that it is proper to permit the finding of the Board of Regents as to the character of the organization in question to be *prima facie* evidence thereof (which is a rule of evidence, rather than a presumption), it is quite another matter to say that knowledge of that character can be imputed merely because of membership.

Appellee (pp. 31-33) suggests that a person capable of being a teacher should be aware of the purposes of an organization he belongs to. Of course he should. But if there is room for difference of opinion concerning that purpose, is a teacher to be burdened with a harsh presumption because in fact he believes the purpose to have been innocent, rather than guilty? Actually, of course, the presumption provision of the law is designed to compel acceptance by the individual employees of the administrative findings and resign within the ten-day grace period (see comment, pp. 13, 27, 32). What it comes down to is this:

An employee who accepts that finding and resigns can be said to have knowledge of the improper character of the organization but as to him the presumption has no effect. An employee who believes that the determination was wrong, who still believes in the innocence of his organization and refuses to resign, he is presumed to have known all along that the organization was guilty! Can a presumption reach greater heights of absurdity?

3. a. Appellee argues (pp. 34-37) that the issue of vagueness is not "ripe for decision" because it was not discussed by the New York Court of Appeals. But that is not the fault of those who are challenging the law. Indeed, in the *Thompson* and *L'Hommedieu* cases, that issue was decided in accord with the view here expressed by appellants. Mr. Justice Schirek (196 N. Y. Misc. 686) ruled that Education Law § 3021 was vague because the terms "treasonable" and "seditious" were, in common usage, the equivalent of "subversive". And he quoted a statement by Mr. Justice Jackson made when he was Attorney General concerning the vagueness of that expression (see Jurisdictional Statement in No. 312 at pp. 68-70). Moreover, the point was pressed by appellants in their briefs in the New York Court of Appeals.*

The argument that decision by this Court should await interpretation by the state courts fails because the words used are susceptible of no limiting judicial construction which would give to § 3021 any scope not covered by Civil Service Law § 12-a.

b. Appellee briefly suggests (p. 38) that the word "treasonable" has a definite meaning because the United States Constitution (Art. III, §3) and the penal Law of New York (§ 2380) both define "treason". In substance the two definitions coincide and refer only to things done in time of war or attempted rebellion.

* That is recognized by the Attorney General in his brief amicus (A. G. p. 33).

Surely the ordinary understanding of "treasonable" is much more extensive and involves betrayal of a trust. Its equivalent (according to Webster) is "seditious"; its antonym "loyal". That is the sense in which the epithet was used, for instance, by Mr. (now Judge) Murphy in his summation in the *Hiss* case.

If, therefore, § 3021 is limited to the concept of treason in the Constitution,³ it adds nothing to Civil Service Law § 12-a. And if not so limited, its meaning is beyond confinement by judicial standards.

c. The same observations apply, with even greater force, to the word "seditious". Appellee (pp. 38-40) argues that this should be so defined as to equate with the crimes specified in 18 U. S. C. 2384, 2385, and New York Penal Law § 161. If so, we are back where we started.

But, of course, the term "seditious" covers a much wider field than is described in these statutes. While it includes the concept of revolt (as stated in the definitions cited on p. 39), it also includes the concept of "exciting to discontent against the government". The extent to which this concept was carried in prosecutions under the Sedition Act of 1798* should be a warning against permitting such a word to be the measure of anyone's qualifications to teach.

Seditious, like subversive, is an epithet directed at what is unorthodox in politics—often at what later becomes accepted. As Professor Chafee has said, "the victims of state trials are frequently the precursors of statesmen"—and he gives a long list of instances (*Free Speech in the United States*, p. 515).

The suggestion (p. 40) that a teacher is unfit who seeks to incite to violence or obstructs the lawful processes of government is beside the point. The statute reaches also the teacher who is expounding advanced ideas—unfortunately there are many who would disqualify teachers on that score, but surely this Court will not give such an attitude its sanction.

* The story has just recently been retold by Prof. John C. Miller in *Crisis in Freedom*.

7

d. A final word about a comment made by appellee (p. 40), echoed by the Attorney General in his brief amicus (A. G. p. 34), that since this is not a criminal statute there is no need for precision. Reference is made to the *Douds* (339 U. S. 382, 409, 412-413) and *Dennis* (341 U. S. 494, 515, 516) cases. There is no comparison between the disqualification of a person to teach involved in the Feinberg Law and the disqualification to be a union officer involved in the Taft-Hartley Law. Nor is there any comparison with the scope of the words used. Here, moreover, the only possible precise meaning which might be given to the challenged section equates it with a section not challenged on the score of vagueness. To strike down § 3021, therefore, would not leave the state without remedy.

CONCLUSION

All of this highlights the basic unconstitutionality of the statute. For by the power to list the Regents are given a power over organizations wholly incompatible with the principles of our democracy. No one need suppose that this power will be confined to school employees. If here sustained it will no doubt be extended to all public employees—and not in the State of New York alone.

It may be said that the damage has already been done by the lists put out by the United States Attorney General and other groups (see Appendix, Palmer, *The Communist Problem in America*). Certainly the uses to which these lists have been put by publications such as *Red Channels* should give pause to those who value freedom. But because harm has already been done is no reason for this Court to give its approval to its continuation and expansion.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
Counsel for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN,
DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

APPELLEE'S BRIEF

December 21, 1951.

DENIS M. HURLEY,
*Corporation Counsel of the
City of New York,
Attorney for Appellee.*

MICHAEL A. CASTALDI,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
BERNARD FRIEDLANDER,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
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DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPELLEE'S BRIEF

Opinions Below.

This case, wherein the plaintiffs-appellants seek a declaratory judgment establishing the unconstitutionality of the so-called Feinberg law (New York Laws of 1949, Ch. 360; printed in Appendix A of this brief, pp. 42-45), is before this Court after a unanimous decision by the New York Court of Appeals sustaining the constitutionality of such law and affirming a dismissal of the complaint by the Appellate Division, Second Department. The validity of the law was likewise upheld by the unanimous decision of the Appellate Division, which reversed a decision by the Supreme Court, Kings County, ruling the statute unconstitutional and granting the plaintiffs judgment on the pleadings. An opinion was written by each Court.

plores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three, and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby re-numbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a

listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide, in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

.
EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of

any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open

court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

CHAPTER XV-B

SUBVERSIVE ACTIVITIES

SECTION 254. *Disqualification or removal of superintendents, teachers and other employees.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employees who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later

than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges

as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

.

APPENDIX B

EXCERPTS FROM ARTICLES ON ACADEMIC FREEDOM

1. Max Lerner in *The American Scholar*, Summer 1949, p. 338:

"What happens in the end is that the universities become uncreative—not in the Russian way of fanatical dogmatism, which is bad enough but presents no calculable danger in America, but in the American way of growing anemic, safe for everything except what requires courage and challenges the structure of power.

As the *New Yorker* editors put it, the firing of Communists would make 'millions of highly fit Americans a little cautious, a little fearful of having naughty thoughts, a little fearful of believing differently from the next man, a little worried about associating with a group or party or club.' And again, 'in this land an ousted professor is not an island entire of itself; his death diminishes us all.'

"The problem then, as I see it, is not so much one of academic freedom to bail out men who themselves despise it, but one of intellectual health to keep the universities alive. I do not minimize the risk involved when men are allowed to continue teaching whose allegiance to some onward-and-upward or some downward-to-the-pit cause is greater than their allegiance to the open mind. But every course of action involves a balancing of risks. The question is: what risk can we best afford to take—that a few Communists will have their jobs protected, or that the competition of ideas will be hedged in and *No Trespassing* signs will be put up where they least belong in American life?"

2. Helen M. Lynd in *The American Scholar*, Summer 1949, p. 353:

"The thing [that stands out most clearly in all this is that when Communists are made the focus of attack, the main damage is done, not to Communists, but to all independent thought and action. As Dr. Meiklejohn says, 'All teachers are placed on probation.' And all teaching and all students and all democratic activity are thereby impoverished. The actual effect of this approach to academic freedom is to drive communism underground and to cast suspicion on anyone who supports any liberal or progressive cause."

3. Kalman Seigel in *New York Times*, May 10, 1951, p. 28:

"Such caution, in effect, has made many campuses barren of the free give-and-take of ideas, the study found. At the same time it has posed a seemingly insoluble problem for the campus liberal, depleted his ranks and brought to many college campuses an apathy about current problems that borders almost on their deliberate exclusion."

4. Report of National Education Association, as summarized by Dr. Martin Essex in N. Y. Times, July 6, 1951, p. 25:

"Teachers avoid reference in the classroom to sex, criticism of prominent persons, separation of church and state, race relations and communism (in that order), the study showed. They are afraid, it asserted, that if these—and other controversial topics—are mentioned in the classroom, the parents, supervisors or outside groups will pounce on them and 'hang them' professionally. Teachers are frightened to 'stand up and be counted,' Dr. Essex said.

"A serious implication of the study, said Dr. Essex, is that teachers now take for granted the policy of not offending anyone. They seek to keep peace within their ranks, but they pay 'an awfully high price for it,' he added. For the most part, the teachers themselves keep out controversial issues, or anything that might offend a member of the school board of the community.

"We call it voluntary censorship,' explained Dr. Essex. 'It is the most insidious force in public-school life today.'

"Textbooks are removed, even though they have been used for twenty or more years, simply to avoid getting into a row with the pressure groups,' Dr. Essex said. 'This is an utterly absurd and untenable situation. Voluntary censorship is growing by leaps and bounds throughout the country. It is a serious problem, one that affects the basic liberties and freedoms of our schools.'

5. Editorial, N. Y. Times, July 9, 1951:

"The National Education Association's report on 'The Freedom of the Public School Teacher' makes a gloomy reading. Fearful of controversy and harried by pressure groups, public school teachers over the country, the report declares, are increasingly reluctant to discuss in the classroom such topics as separation of church and state, race relations and communism. 'Voluntary censorship' is increasing rapidly and textbooks are changed because of pressure from particular groups even though such texts may have been

otherwise satisfactory for years. Here surely is an unhappy picture, alleviated only by the fact that the National Education Association recognizes the situation for what it is and is combating it.

"Obviously this tendency weakens our public school system in its prime function: the preparation of our young people for adult life in which there is controversy on many issues. 'Voluntary censorship' of the type here described is a withdrawal from reality not to be condoned either because these matters are 'delicate' or because there are strong forces and conflicts raging about them. As adult citizens, those who are now in our schools will have to face these and other problems and participate in the social processes which they generate. Questions of this kind cannot be avoided and the only alternatives are whether the schools are or are not going to prepare their students to cope with such problems.

"To the extent that our teachers have surrendered before particular interest groups, or before vague fears, they are to be criticized, and the N.E.A. report is implicitly such a criticism. But the more important part of the blame falls on the community at large, on the vast mass of citizenry who believes in the democratic process but who have not taken steps to exert counter-pressure for the maintenance of our schools as free forums in which all major problems are faced. Minority pressure groups and timorousness will rule so long as those who are concerned about free expression remain silent. The solution to this unhealthy situation is clear; it is up to all of us to take the necessary action to effectuate that solution."

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

**IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE
TIGER and, EDITH TIGER,**

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPELLANTS' REPLY BRIEF

**ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,**
Counsel for Appellants.

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APPELLANTS' REPLY BRIEF

We shall attempt briefly to deal here with the various points made by the Attorney General of the State of New York in his brief *amicus curiae*,* as well as with the arguments of appellee.

1. On the basic constitutional issue there seems to be a complete misunderstanding of appellants' position. Feeling bound by *Garner v. Los Angeles Board*, 341 U. S. 716, we are, of course, not arguing that a state may not disqualify from public employment persons who advocate the overthrow of the government by force or belong to organizations knowing that these so advocate. Irrelevant, therefore, is all discussion concerning the need for "fidelity" (A. G. pp. 25-32). We are not, however, resting our primary attack on the Feinberg Law on procedural grounds only (as suggested by appellee, p. 20). Important as these are to the individuals who may be affected by the law, our challenge under the First Amendment (as read into

* References will be (A. G. p. ____).

The opinion of the Court of Appeals was written by Judge LEWIS and is reported in 301 N. Y. 476 (R. 54). In the Appellate Division, Second Department, the opinion was written by Mr. Justice CARSWELL. It is reported in 276 App. Div. 527 (R. 50). The opinion written by Mr. Justice HEARN at Special Term of the Supreme Court, Kings County, is reported in 196 Misc. 873 (R. 35).

As a result of the dismissal of the complaint as to certain of the plaintiffs at Special Term of the Supreme Court, the caption of this case, originally *Lederman et al. v. Board of Education of the City of New York*, is now *Adler et al. v. Board of Education of the City of New York*.*

The New York Court of Appeals, when deciding the instant case, simultaneously and in the same opinion disposed of appeals in two other cases in which the validity of the Feinberg law was unsuccessfully challenged, *Thompson v. Wallin* and *L'Hommedieu v. Board of Regents* (301 N. Y. 476; Record, p. 54).

Statement of Jurisdiction.

Plaintiffs-appellants have brought this case before this Court under Title 28 U.S.C. § 1257, as an appeal from a final judgment of the highest court of a State rejecting an attack on a State statute claimed to be in conflict with the Federal Constitution. The decision of the Court of Appeals was rendered on November 30, 1950 (54). This appeal was allowed by the Chief Judge of the Court of Appeals on January 17, 1951 (72). On June 4, 1951, this Court noted probable jurisdiction (75).

Statement of the Case.

The defendant-appellee deems it necessary to correct a portion of plaintiffs-appellants' statement of the case in which they set forth what defendant-appellee regards as an inaccurate and altogether incomplete summary of the

* The Court held on the authority of *United Public Workers v. Mitchell*, 330 U. S. 75 (1947), that the plaintiffs who sued as teachers had no standing to challenge the Feinberg law in the absence of any official action applying the statute against them individually, but ruled that the plaintiffs who sued as taxpayers had standing to attack the Law under Section 51 of the New York General Municipal Law.

Feinberg law and of the interpretation given to it by the New York Court of Appeals. This summary appears in the final paragraph of the statement of the case in the brief of plaintiffs-appellants (p. 3).

Such summary omits to state that the Court of Appeals construed the Feinberg law as authorizing the Board of Regents to promulgate lists of organizations advocating the overthrow of the government by force or unlawful means, only after notice and a hearing accorded to such organizations, with a full right on the part of such organizations to judicial review of the determination of the Board of Regents.

Such summary states that the Feinberg law, as interpreted by the Court of Appeals, makes proof of membership by a teacher* in an organization so listed *prima facie* evidence of disqualification. Such summary omits to state however: (1) that this rule of *prima facie* proof goes into operation only where membership in a listed organization is retained by the teacher more than ten days after the promulgation of the list; and (2) that while proof of membership thus retained in a listed organization *prima facie* establishes that the organization advocates overthrow of the government by force or unlawful means and that the accused teacher knows this, the Feinberg law nevertheless requires (a) that the teacher be accorded a hearing at which he must be permitted an opportunity to offer contradictory evidence, and (b) that if substantial contradictory evidence is presented, the educational authorities must meet the burden of proving the nature of the organization and the teacher's knowledge thereof, by direct proof and by a fair preponderance of the evidence. Likewise omitted from the summary is any mention of the unquestioned statutory right of teachers to judicial or administrative review of a determination of disqualification, at their election.

*The Feinberg law applies to "superintendents of schools, teachers or employees in the public schools in any city or school district of the state" (New York Education Law § 3022, subdivision 1; see Appendix A of this brief). In the interest of brevity, and since the vast majority of persons to whom the law applies are teachers, such persons will be hereinafter referred to as teachers.

The Feinberg Law, as Construed by the Highest Court of New York State.

The purpose of the Feinberg law is to implement two earlier statutes which provide in effect that teachers who advocate the overthrow of the government by force, violence or unlawful means, or who knowingly hold membership in organizations advocating such action, shall, after appropriate proceedings (including notice and hearing), be removed from the public school system. One of these earlier statutes is likewise designed to prevent persons engaging in such conduct from being appointed as teachers in the public schools.

1. The Statutes Implemented.

The substance of these earlier laws is as follows:

a. § 12-a of the Civil Service Law.

By the 1939 Laws of New York State, Chapter 547, the Legislature added to the New York Civil Service Law, § 12-a* (printed in Appendix A of this brief, pp. 45-46), which, as interpreted by the highest New York Court, provides in substance that no person shall be appointed to or retained in any position in the State civil service or in the public educational system who wilfully advocates the overthrow of the government by force, violence or unlawful means, or who holds membership in an organization advocating such action, with knowledge of such advocacy by the organization. The Court of Appeals, in defining the kind of membership which disqualifies under § 12-a of the Civil Service Law and the Feinberg law, explicitly limited the disqualification to one who "knowingly holds membership" in an organization having such illegal objectives (*Thompson v. Wallin*, 301 N. Y. at p. 494; Record, p. 67). It is clear, therefore, that as far as § 12-a of the Civil Service Law, as implemented by the Feinberg Law, provides for disqualification based on membership in an organization, such disqualification is

* Last amended by New York Laws of 1940, Chapter 564.

limited to cases where the teacher involved holds membership in the group with knowledge of its advocacy of violent or illegal overthrow of the government. In the decision of the Appellate Division in this case, the Court declared (276 App. Div. at p. 530; Record pp. 52-53):

"The disqualification referred to in subdivision (c) of section 12-a, in respect to membership by an employee in a described organization means with knowledge of the employee of its subversive character."

Subdivision d of § 12-a expressly provides that any person ruled ineligible for public employment under such section or dismissed thereunder, may obtain judicial review of such determination. The provisions of subdivision d are as follows:

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

Other provisions of law, which must be read with § 12-a, guarantee that no teacher may be removed from his position on the grounds specified in that section without prior notice and hearing. These provisions of law are discussed *infra*, pp. 14-15 of this brief.

b. § 3021 of the Education Law.

By New York Laws of 1917, Chapter 416, the Legislature added to the State Education Law, § 3021 (formerly § 568), which provides in substance that any "person employed as

superintendent of schools, teacher or employee in the public schools" who utters treasonable or seditious words or commits a treasonable or seditious act while in such service, shall be removed from his position in the public school system. The text of § 3021 is printed in Appendix A of this brief, p. 45.

As in the case of § 12-a of the Civil Service Law, no dismissal may be ordered under § 3021 without prior notice and hearing in the manner explained *infra*, pp. 14-15.

II. The Implementing Statute (the Feinberg Law), the Regulations Promulgated by the Board of Regents Thereunder and the Interpretive Memorandum of the State Commissioner of Education:

a. The legislative findings set forth in the preamble of the Feinberg Law.

In 1949 the New York State Legislature determined that by reason of conditions which it found to exist in the public educational system, it was necessary to provide legislative means for the effectuation of the provisions of § 12-a of the Civil Service Law and § 3021 of the Education Law. For this purpose, the Legislature enacted the Feinberg law.

The first section of the Act consists of a legislative declaration embodying the findings of the Legislature as to the conditions necessitating the enactment of the statute. The Legislature found that despite the protective statutes described above, members of subversive groups advocating violent overthrow of the government, including members of the Communist Party and its affiliated organizations, had infiltrated into the personnel of the public school system. It was found as a matter of legislative determination that members of such groups frequently use their official positions to advocate and teach the doctrines of such groups; that such members are frequently bound by oath or agreement to follow and teach a prescribed party line or group dogma without regard to truth or free inquiry; that the result of the infiltration of such persons into the public educational system is that the propaganda of such

groups can be disseminated among children of tender years by teachers to whom they look for guidance, authority and leadership; that such propagandizing of pupils may be and frequently is sufficiently subtle to escape detection in the classroom; that it is therefore difficult to measure the menace of the infiltration of such persons into the public school system; that such infiltration was not prevented previously and threatens in a dangerous manner to become a commonplace in the schools; and that in order to combat this grave menace it is essential that a policy of rigorous enforcement be observed in carrying out the above-described laws which forbid the appointment to or retention in the public educational system of persons who are members of organizations advocating violence and illegal conduct, such as the Communist Party and its affiliated organizations. Accordingly, the Legislature found that the Board of Regents, the administrative body which heads the New York State educational system (McKinney's Education Law, §§ 201-216), should be directed to take affirmative action for the enforcement of such protective laws in the manner prescribed by the remaining portions of the Feinberg law, which are described *infra*.

The word "subversive" is used in the preamble of the Feinberg law as a descriptive term limited to organizations which advocate the overthrow of the government by force or illegal means. This term is likewise used in the preamble for the purpose of labeling such doctrine of violent overthrow. However, the remainder of the Act, which contains its operational provisions, mentions the word "subversive" only once (except for the inclusion of the term in the heading of § 3022 of the Education Law), and then defines the term as applying only to organizations which advocate the overthrow of the government by force or unlawful means, as described in § 12-a of the Civil Service Law. While the preamble refers to the Communist Party and its affiliated organizations, such allusions are for the purpose of illustrating the kind of organization believed to come within the prohibitions of § 12-a of the Civil Service Law.

In any event, the preamble cannot be treated as a determination of the organizations or persons subject to or affected by the provisions of the Feinberg Law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law, for the New York Court of Appeals so held in this case in the following language (301 N. Y. at p. 493, Record, p. 66):

“ . . . the preamble of the Feinberg Law . . . is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law.”

- b. Provisions of the Feinberg Law prescribing action to be taken by the Board of Regents for the purpose of enforcing Civil Service Law, § 12-a and Education Law, § 3021.

The operational portion of the Feinberg Law is contained in a new § 3022 which it adds to the Education Law.

1. Preparation of list of organizations.

Subdivision 1 of § 3022 directs the Board of Regents to promulgate and enforce rules for the disqualification and removal of persons who are ineligible for appointment to or retention in positions as teachers under § 12-a of the Civil Service Law or § 3021 of the Education Law. Such rules are required to specify appropriate methods and procedure for the enforcement of these statutes.

Subdivision 2 of § 3022, as interpreted by the New York Court of Appeals, provides that the Board of Regents, after inquiry, notice and hearing, shall prepare a list of organizations which it finds to be subversive “in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set

forth in section twelve-a of the civil service law." The Board of Regents is authorized to amend and revise the list from time to time. In making its inquiries, the Board may utilize similar lists promulgated by any Federal authorities authorized to do so by Federal Law, regulation or executive order, and the Board may receive any supporting evidence or material from the Federal authorities which they may make available to it.

The New York Court of Appeals has made it clear that, regardless of any Federal listings or receipt of evidence from the Federal authorities, the Board of Regents may not place the name of any organization on its list unless, after notice to the organization and a hearing, it finds that such organization presently advocates the overthrow of the government by force or unlawful means. In this connection the Court of Appeals declared (301 N. Y. at p. 493; Record p. 66):

"Furthermore, a textual examination of the provisions of the Feinberg Law—section 3022—discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry."

Again, in the same passage of its opinion, the Court of Appeals refers to an organization placed on the list as "any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means."

In further affirmation of the right of any organization to notice and a hearing conducted by the Board of Regents, in advance of a determination by the Board as to whether its name shall be placed on the list, the Court stated (301 N. Y. at pp. 493-494; Record, p. 66):

"... subdivision 2 of section 3022 directs the Board of Regents, after inquiry, notice and hearing,

to list 'organizations which it finds to be subversive in that they advocate * * * that the government * * * shall be overthrown or overturned by force, violence or any unlawful means' * * *."

Moreover, the Court of Appeals stated in equally positive terms that any organization named in such list has a right to judicial review of the determination of the Board of Regents including it among the listed groups. As to this point, the Court of Appeals said (301 N. Y. at p. 493; Record, p. 66):

"In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act."

In *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), Mr. Justice FRANKFURTER noted in his concurring opinion that the Feinberg Law "makes notice and hearing prerequisite to designation of organizations" (p. 173, n. 20) and Mr. Justice JACKSON likewise made reference to this fact in his concurring opinion (p. 186).

Under the procedure of the Board of Regents, hearings on the listing of organizations are public, and the transcript of the evidence taken at the hearing is a public record (New York Public Officers Law, Section 66). Any person against whom charges are preferred pursuant to the Feinberg law, or his attorney, may examine a transcript of such evidence.

2. Issuance of rule that membership in listed organization is *prima facie* evidence of disqualification under § 12-a of the Civil Service Law for service in the public school system.

Subdivision 2 of § 3022 of the Education Law requires the Board of Regents to include in the regulations promulgated by it under that section, provisions making membership in any organization listed by the Board *prima facie* evidence of disqualification for appointment to or retention in any position in the public schools of the State.

In accordance with this direction, the Board of Regents has included provisions to that effect in subdivision 2 of § 254 of the Rules of the Board of Regents adopted on July 15, 1949, pursuant to the Feinberg law. Section 254 is set forth in Appendix A of this brief, pp. 47-50.

The Court of Appeals has construed this provision of the Feinberg law to mean that proof of the membership of a teacher in a listed organization, establishes *prima facie* the two elements of disqualification under § 12-a of the Civil Service Law, namely: (1) that the organization is one advocating violent overthrow; (2) that the accused teacher knows it to be such. Thus, the Court of Appeals said (301 N. Y. at p. 494; Record, p. 67):

"The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment."

But the Court of Appeals also held that implicit in this presumption is the requirement of a hearing at which the accused is given an opportunity to present substantial evidence tending to overcome such *prima facie* evidence of the nature of the organization and of the accused's knowledge thereof. As to the requirement of a hearing, the Court said (301 N. Y. at p. 494; Record, p. 67):

"Thus the phrase '*prima facie* evidence of disqualification', as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision."

Moreover, the Court of Appeals likewise made it clear that when this rule as to *prima facie* proof goes into operation in any case, the burden of proof does not shift from

the educational authorities preferring the charges, and that it merely becomes incumbent upon the accused to come forward with substantial evidence contradicting the facts presumed, i.e., the nature of the organization, and the accused's knowledge thereof. If such evidence is produced by the accused, the presumption dissolves, and the educational authorities must sustain the burden of proving the facts of disqualification under § 12-a of the Civil Service Law by a fair preponderance of the evidence. This was explained by the Court of Appeals in the following language (301 N. Y. at p. 494; Record, p. 67):

"The presumption growing out of a *prima facie* case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely on it."

Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].)"

Moreover, the Court declared (*ibid.*):

"Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above." [Section 12-a, subd. d of the Civil Service Law, providing for judicial review].

The Appellate Division aptly described the manner of operation of this rule of *prima facie* proof, as follows (276 App. Div. at p. 530; Record, pp. 52-53):

"(3) A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under subdivision 2 of section 3022 of the Education Law, namely, that the organization does unlawfully advocate overthrow of the Government and that a member-employee has

knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the Government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in subdivision (c) of section 12-a, in respect to membership by an employee in a described organization, means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, § 12-a, subd. [d].)"

The provisions of subdivision 2 of § 254 of the Rules of the Board of Regents are an administrative affirmation of the legislative intent, authoritatively explained by the Court of Appeals, that the presumption of disqualification under the Feinberg law by reason of membership in an organization, shall be limited to cases where the teacher retains membership after the listing of the organization. Subdivision 2 of Section 254, so far as here relevant, provides as follows:

"Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith."

3. Independent statutes requiring notice and hearing in proceedings for removal of teachers under the Feinberg Law, § 12-a of the Civil Service Law and § 3021 of the Education Law, and affording judicial or administrative review of such removals.

i. Notice and hearing.

The operation of the provisions of the Feinberg law, of § 12-a of the Civil Service Law and of § 3021 of the Education Law can be properly understood only when such statutes are read in the context of other New York laws which provide that teachers having tenure shall not be removed without notice and a hearing, and which guarantee judicial or administrative review of a determination of dismissal. Such protections exist independently of the right to a hearing which is conferred by the Feinberg law even in the absence of tenure, where the presumption thereunder is invoked.

Under the provisions of § 2509,* subdivisions 2, 3 and 5, § 2573,** subdivisions 4-8, and §§ 3012 and 3013 of the New York State Education Law, no teacher in the public school system who has tenure may be removed except after preferment and service of written charges and a hearing, with full right on the part of the teacher to produce witnesses in his behalf and to cross-examine those who testify against him.

The above-described rights to notice and a hearing in removal proceedings are fully applicable to proceedings to remove a teacher or educational employee under the Feinberg law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law.

The interpretive memorandum of the New York State Commissioner of Education (printed in Appendix A of this brief, pp. 51-55) on the administration of the Board of Regents' Rules promulgated under the Feinberg law, explicitly states that neither that law nor § 12-a of the Civil

* See McKinney's 1951 Supplement to the Education Law.

** Formerly § 2523; see former § 2523 in main volume of McKinney's Education Law for these subdivisions.

Service Law, nor § 3021 of the Education Law diminishes in any way the independent right of teachers and educational employees to notice and hearing in removal proceedings. The relevant portion of the memorandum reads as follows:

"3. The preferring of charges. Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses, including their accusers, to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal."

ii. Judicial or administrative Review.

Several methods of judicial review, as well as a procedure for administrative review, are guaranteed in the alternative by the New York statutes to a teacher removed under the Feinberg law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law. A teacher deeming himself aggrieved may select his remedy among the following alternative procedures:

(1) Where the removal is predicated on § 12-a of the Civil Service Law, the teacher may obtain a stay of the order of disqualification and judicial review of such order, as specified in subdivision d of that section (see summary of provisions of § 12-a, *supra*, p. 5 of this brief).

(2) Regardless of the ground for removal, the teacher, under § 2509, subdivision 2, § 2573, subdivisions 5, 6 and § 3013, subdivision 4 of the Educa-

tion Law, may at his election obtain judicial review by bringing a proceeding under Article 78 of the Civil Practice Act.

(3) Regardless of the ground for removal, the teacher may elect to appeal to the State Commissioner of Education pursuant to § 310 of the Education Law.

The Issues.

Reduced to their simplest terms, the basic factors underlying the issues presented to the Court by this case are as follows:

A. A state statute (Civil Service Law, § 12-a) requires that no person shall be employed as a teacher in the public schools who (a) holds membership in any organization advocating the overthrow of the government by force or unlawful means and (b) has knowledge of such characteristic of the organization. The constitutionality of such statute is not here attacked and no issue in regard thereto is raised for adjudication by this Court.

B. Another state statute (the Feinberg law) provides that an administrative body shall prepare a list of organizations advocating violent overthrow, after notice to all organizations affected and the holding of hearings. Any such listing is subject to judicial review at the suit of any organization named.

C. Under the terms of the same statute (the Feinberg law), at the hearing (mandated by statute) of removal proceedings brought against a teacher on the ground of membership in a listed organization, proof of membership by the teacher in such organization is *prima facie* evidence of the two elements of disqualification described in item A, *supra*. However, if substantial evidence negating such

elements is presented by the teacher, the presumption dissolves, and the educational authorities must prove both elements by a fair preponderance of the evidence. Any determination of dismissal is subject to judicial or administrative review at the election of the removed teacher.

The issues before this Court are therefore as follows:

1. Does the State statute (the Feinberg law) providing for the listing of violent overthrow organizations and establishing the above-described rule of *prima facie* proof abridge freedom of speech or assembly?
2. Do the provisions of such statute prescribing such rule of *prima facie* proof deny teachers procedural due process?
3. Is such statute (as distinguished from the laws which it implements) so vague in its terms as to deny due process?

SUMMARY OF ARGUMENT.

I.

The Feinberg law does not abridge freedom of speech or assembly. No infringement of constitutional rights can be attributed to State legislation which directs that no person shall be employed as a teacher in the public schools who holds membership in an organization advocating overthrow of the government by force or unlawful means, and who knows of such advocacy by the organization.

I.

The procedures prescribed by the Feinberg law for disqualifying as teachers persons who knowingly hold membership in organizations advocating the overthrow of the government by violence or unlawful means, constitute a fair and reasonable method of ascertaining the facts of disqualification, and do not deny due process of law.

1. Standards for determining compliance with the requirements of procedural due process.
2. Fairness of the Feinberg law procedure as reasonably adapted to meet the problems of investigation and proof inherent in the subject matter involved.
3. Validity of the presumption.
4. The features of the *Garner* case legislation which the concurring and dissenting Justices there deemed constitutionally objectionable are absent from the Feinberg law.

III.

The Feinberg law is not unconstitutionally vague:

1. The terms of the Feinberg law affecting the rights of those subject to its provisions are clear and unambiguous.
2. It would be inappropriate for this Court to pass upon the constitutionality of § 3021 of the Education Law on this appeal, since the section has not been interpreted by the Court of Appeals.
3. Section 3021 of the Education Law is not unconstitutionally vague.

ARGUMENT.

POINT I.

The Feinberg Law does not abridge freedom of speech or assembly. No infringement of constitutional rights can be attributed to state legislation which directs that no person shall be employed as a teacher in the public schools who holds membership in an organization advocating overthrow of the government by force or unlawful means, and who knows of such advocacy by the organization.

1.

The decisions of this Court in *Garner v. Los Angeles Board*, 341 U. S. 716 (1951) and *Gerende v. Election Board*, 341 U. S. 56 (1951), have clearly established the proposition that the provisions of the Federal Constitution which forbid the States to abridge freedom of speech or assembly are not infringed by State or local legislation which disqualifies for or removes from public employment persons who advocate the overthrow of the government by force or unlawful means, or who, knowing that an organization advocates overthrow of the government by such means, hold membership therein.

Thus, no doubt remains that there is nothing in the Federal constitution which compels the people of the State of New York or any other State to hire or retain as teachers of their children, persons who, living in a society where governmental, social and economic change may be accomplished by peaceful persuasion and the democratic processes of the ballot, nevertheless urge, or knowingly hold membership in organizations which urge, that organized destruction of human life, violence and illegal tactics should be used as a means of bringing about changes in the existing form of government or in the present social and economic order. The principle that the Constitution does not confer a right to join conspiracies to overthrow

the government by force has been explained by this Court at length and with unmistakable clarity in *Communication Assn. v. Douds*, 339 U. S. 382 (1949) and *Dennis v. United States*, 341 U. S. 494 (1951).

It is manifest from plaintiffs-appellants' brief that they accept these propositions as established constitutional doctrine (see pp. 5-6, where they concede that § 12-a of the Civil Service Law is "of the character of the charter amendment held valid in the *Garner* case," and p. 9, where the validity of § 12-a is again recognized).

In consequence, their attack on the Feinberg law boils down to a contention that it utilizes unconstitutional procedural methods in order to enforce grounds of disqualification for public service found constitutionally unobjectionable by this Court in the *Garner* and *Gerende* cases.

We propose to demonstrate in Point II that the narrow phraseology and structure of the Feinberg law bring it more clearly within the principles of governmental self-protection enunciated in the *Garner* and *Gerende* cases than the legislation before this Court in those cases, and that the Feinberg law is completely free of the features of the California legislation which prompted the partial and complete dissents in this Court in the *Garner* case. Furthermore, it will be shown in Point II that the Feinberg law, with its ample provisions for notice and hearing, does not raise the problems of due process presented by the procedures of the Federal loyalty program which were upheld in *Bailey v. Richardson*, 341 U. S. 918 (1951).

Plaintiffs-appellants attempt to distinguish this case from the *Garner* case by suggesting in their brief (pp. 8-9, 11) in an oblique and indirect manner that proof of scienter is not required under the Feinberg law, urging that the employee is disqualified not on the basis of personal knowledge, but by being compelled to accept the determination of the Board of Regents as to the nature of the organization. The plausible appearance which has been given this contention does not serve to conceal its speciousness.

As is shown in the analysis of the Feinberg law set forth, *supra*, pp. 10-13, the Court of Appeals, as well as

the Appellate Division, Second Department, has held that there can be no disqualification or removal under the Feinberg law or § 12-a of the Civil Service Law on the grounds of membership in any organization unless (a) it is established by a fair preponderance of the evidence that the member knows that such organization advocates overthrow of the government by force or unlawful means; and (b) the member is given an opportunity at the hearing of his individual case to show that he does not have such knowledge. Although it is scarcely necessary, reference may appropriately be made at this point to the general rule that in passing on the constitutionality of State legislation, this Court considers itself bound by the interpretation given such legislation by the highest State Court. *Winters v. New York*, 333 U. S. 507, 514 (1948).

It has been clearly demonstrated in our analysis of the Feinberg law that no teacher may be removed thereunder from a position in the public school system because of membership in an organization unless the educational authorities, in a hearing accorded such teacher on due notice, prove by a fair preponderance of the evidence the facts of membership, advocacy of violent or illegal overthrow on the part of the organization, and knowledge of such advocacy by the teacher. The issues as to the fairness, reasonableness and constitutionality of the procedures under the Feinberg law whereby such facts may be established by the educational authorities, including the rule of *prima facie* proof—the actual target of plaintiffs-appellants' attack—are discussed in Point II, where we propose to demonstrate that the Feinberg law fully satisfies the constitutional requirements as to procedural due process.

2.

We join with plaintiffs-appellants in deprecating invasions of academic freedom and curtailment of the legitimate rights of teachers to freedom of expression and action.

But so long as fair and reasonable procedures are available for ridding the teaching staffs of those who knowingly

become part of a conspiracy to overthrow the government by force, the preservation of intellectual freedom and civil liberties does not necessitate the employment in the public schools of such persons—individuals who have clearly demonstrated by their conduct that they are unfit to teach children in a democratic society.

The Feinberg law does not prevent or discourage teachers from joining any organization which is not engaged in an attempt to convert our democratic form of government into a police state by force or unlawful means. On the contrary, it aids all sincere, well-intentioned teachers in selecting their affiliations, for it furnishes them with a list of organizations found by the State's highest educational body to be of the violent overthrow type under a procedure affording notice, public hearing and judicial review to such organization, and it gives teachers ten days in which to terminate their membership in any listed group.

The defense of democratic institutions demands that they be protected from corruption by totalitarians who would use them to destroy the very freedoms which are invoked by these disciples of force as a justification for their retention in the public service.

This is recognized by leading groups and figures concerned with the protection of civil liberties. The National Education Association, the largest and most widely known association of teachers in America, refuses to admit to or continue in membership persons who are members of organizations advocating governmental change by force or illegal means.* It has gone on record as indorsing the proposition that membership in a totalitarian organization and in the teaching profession are not reconcilable and that the issue involved is not civil rights but proper qualifications for teaching.**

* Amendment to By-laws adopted at 88th Annual Representative Assembly, July 8, 1950.

** Resolution approved at 1949 Representative Assembly of National Education Association.

POINT II.

The procedures prescribed by the Feinberg Law for disqualifying as teachers in the public schools persons who knowingly hold membership in organizations advocating the overthrow of the government by violence or unlawful means, constitute a fair and reasonable method of ascertaining the facts as to disqualification, and do not deny due process of law.

1. Standards for determining compliance with the requirements of procedural due process.

The concurring opinion of Mr. Justice FRANKFURTER in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), clearly states the tests to be applied in ascertaining whether the requirements of due process are met by the procedures for determining disqualification under the Feinberg law and the related statutes providing for notice, hearing and judicial or administrative review in connection with any determination of disqualification. In discussing the issue as to whether the procedure under the Federal loyalty program for the promulgation of a list of organizations comports with procedural due process, Mr. Justice FRANKFURTER said (pp. 162-163):

"But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.

.....

"It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another."

Whether the procedure of the Federal loyalty program there under review duly observed the "rudiments of fair play", declared Mr. Justice FRANKFURTER (p. 163),

"cannot, therefore be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

It must be borne in mind that the organization and administrative structure of New York State's school system are such as to raise practical problems of investigation and proof in connection with the task of determining the fitness of teachers accused of knowingly holding membership in forcible overthrow organizations.

There are about 4,000 school districts in the State of New York which have the duty and responsibility of passing upon the fitness of educational employees, preferring charges against those found disqualified, and conducting hearings on the charges. Many of these school districts have small staffs, few facilities and modest resources, and would therefore find it most difficult, if not impossible, to conduct inquiries into the nature of organizations, in order to determine whether they come within the forcible overthrow category. An attempt by 4,000 school districts of all sizes throughout the State to ascertain on an individual basis the character of numerous organizations would be inevitably attended by endless potentialities for duplication of effort, incompleteness of inquiry, confusion, misunderstanding and needless expenditure of time, effort and money.

The impracticability of imposing upon numerous subordinate governmental units the task of assembling and passing on proof of the nature of forcible overthrow groups, or of requiring such agencies in all instances to present direct proof of advocacy of violent overthrow by such groups at hearings of disciplinary charges against employees, was recognized by Mr. Justice REED in his dissenting opinion in *Anti-Fascist Committee v. McGrath*, 341

U. S. 123 (1951), where he said with reference to the compilation of the Attorney-General's list under the Federal loyalty program (pp. 191-192):

"if legally permissible, as carried out by the Attorney-General, there is no question but that a single investigation as to the character of an organization is preferable to one by each of the more than a hundred agencies of government that are catalogued in the United States Government Organization Manual. To require a determination as to each organization for the administrative hearing of each employee investigated for disloyalty would be impossible."

2. Fairness of the Feinberg Law procedure as reasonably adapted to meet the problems of investigation and proof inherent in the subject-matter involved.

The procedural provisions of the Feinberg law represent a fair and practical solution to the problem of equipping a loyalty program with a machinery of adjudication which will function in a just and equitable manner, with due consideration for the interests of the public and the rights of the personnel affected.

The task of ascertaining in the first instance the nature of organizations is entrusted to the Board of Regents, the most important and responsible body in the State educational system. The Board, which heads all educational activities of the State and determines educational policies, is composed of distinguished and outstanding citizens chosen for their capacity to perform these important civic functions. As has been shown *supra* (pp. 8-10), the Feinberg law requires that before the Board may make a determination as to the nature of any organization, notice and a hearing must be given the organization. Moreover, judicial review of the Board's determination is available to the organization (*id.*, p. 10).

In prescribing the effect of such determination at individual disciplinary trials, the Feinberg law follows a rule of reason and common sense which fully protects the rights of the accused teacher. Any teacher who retains member-

ship in an organization on or after the tenth day subsequent to the promulgation by the Board of a list specifying that such organization advocates forcible overthrow, becomes subject to the rule that if charges are preferred against him, membership in the organization constitutes *prima facie* evidence of such advocacy by the group and of the member's knowledge thereof (*supra*, pp. 10-13). Evidence of past membership in the group is presumptive evidence that membership has continued, in the absence of a showing that membership has been terminated in good faith (*supra*, p. 13). It is apparent that this is merely a restatement of the long-established common law presumption of continuance.

The listing of the group does not conclude an accused teacher as to its nature or as to his knowledge thereof (*supra*, pp. 10-13), but merely creates a rebuttable presumption. If he presents substantial contradictory evidence, the educational authorities have the burden of proving the nature of the group and his knowledge thereof by a fair preponderance of the evidence (*ibid.*). Similarly where it is presumed from past membership that a teacher has continued his membership after the listing of the organization, the presumption dissolves and the educational authorities have the burden of establishing continued membership by actual proof, if the teacher presents substantial evidence that he terminated his membership in good faith (*supra*, pp. 11-13). Moreover, a full right of judicial review or administrative appeal to the State Commissioner of Education is guaranteed to any teacher found disqualified (*supra*, pp. 15-16).

One of the yardsticks of procedural due process referred to by Mr. Justice FRANKFURTER (*supra*, p. 24) is the existence of "available alternatives to the procedure that was followed." We submit that the Feinberg law procedures represent the only feasible, practical solution to the problems of adjudication involved.

It has already been shown that any plan requiring the school districts of the State to ascertain separately the organizations which advocate forcible overthrow would

be administratively unworkable. If the task is entrusted to a single responsible agency, how may its findings be effectively utilized in individual disciplinary cases if they are not made at least *prima facie* evidence therein?

It is apparent that the preparation of a list of organizations by the Board of Regents under the Feinberg law affords teachers protections and benefits which they would not otherwise enjoy.

Under the Feinberg law procedure, any organization under inquiry receives notice and a public hearing and both its membership and the public are apprised of the accusation that it advocates forcible overthrow. Members of the group may study the evidence presented by the Board of Regents in the hearing, and assist the organization in its presentation of evidence offered in rebuttal. Should the organization exercise its right to test an adverse ruling by the Board of Regents in the Courts by means of an Article 78 proceeding, the organization may also apply to the New York courts for a stay of the disqualifying effects of the listing pending a final judicial adjudication of the issues (New York Civil Practice Act, § 1299).

If any member of a listed group, after considering the evidence produced against it, after the final decision of the courts in any suit brought by the organization to test the issue, and after consideration of the matter during the waiting period prior to the date when a listing becomes effective for purposes of disqualification, still holds the view that the organization's activities are lawful, and retains his membership therein, he may contest the issue as to the nature of the organization in his individual disciplinary hearing. If he there presents substantial evidence contradicting the findings of the Board of Regents, the educational authorities preferring the charges are required to prove the unlawful nature of the organization by a fair preponderance of the evidence.

The argument that the Feinberg law presumption casts upon the teacher an unfair burden of going forward with evidence as to the nature of the organization is manifestly groundless. The procedure under that law gives the

teacher or his attorney the advantage of an opportunity for detailed and deliberate study of the evidence against the organization (a public record pursuant to Public Officers Law, § 66) in advance of the teacher's hearing, so that he is in a far more favorable position to prepare for trial on this issue than he would be if the Feinberg law were not on the statute books.

Moreover, after a full administrative hearing, the teacher may again litigate the issue in the courts by means of judicial proceedings for the review of any determination of disqualification by the educational officials, or he may further litigate the question administratively by appeal to the Commissioner of Education (see analysis *supra*, pp. 15-16 of this brief).

We submit that it would be difficult to conceive of a workable procedure more scrupulously fair to the public employee.

In this connection, it should be noted that in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), Mr. Justice JACKSON spoke of the Federal loyalty program procedure as follows in his concurring opinion (p. 186):

"There are two stages at which administrative hearings could protect individuals' legal rights—one is before an organization is designated as subversive, the other is when the individual, because of membership, is accused of disloyalty. Either choice might be a permissible solution of a difficult problem inherent in such an extensive program."

The Feinberg law and the related statutes guarantee notice, hearing and judicial review *both* to the organization and to its teacher members.

3. Validity of the presumption.

Plaintiffs-appellants' attack on the rule of *prima facie* proof prescribed by the Feinberg law combines a misconception of the nature of the presumption raised and a distortion of the common facts of experience.

The presumption flowing from membership in an organization applies to two elements of proof: (1) advocacy of

violent or illegal overthrow by the organization; (2) knowledge of such advocacy by the member.

As to the first element, the nature of the organization, the Feinberg law merely provides that the findings of an administrative body after notice and hearing shall be *prima facie* evidence—or in other words—shall create a rebuttable presumption, at the hearing of disciplinary proceedings brought against a member of the organization. It has long been recognized by this Court that where definite and specific property rights are involved, no valid objection can be made on due process grounds to a statute which makes the findings of an administrative body or official *prima facie* proof in other proceedings wherein the party against whom the presumption operates is free to rebut it with evidence.

In *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412 (1915), this Court upheld as constitutional a statutory provision making the findings and report of the Interstate Commerce Commission *prima facie* evidence of the facts therein stated in any action by a shipper against a carrier to recover damages for the charging of unreasonable or unjustly discriminatory rates, as determined by the Commission with respect to such shipper after prior investigation and hearing. At the trial of plaintiff shipper's action against a carrier, the plaintiff offered no evidence as to unjust discrimination, exaction of unreasonable rates, or damages sustained, but relied on the findings of the Commission as proof of these matters. In sustaining a recovery by the plaintiff shipper and in rejecting the contention of the defendant carrier that the statutory rule of *prima facie* proof denied due process, the Court said (p. 430):

"It is also urged, as it was in the Courts below, that the provision in § 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law."

In *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U. S. 440 (1916), a riparian owner attacked the constitutionality of an Oregon statute providing for the preliminary determination of claims to water rights by an administrative board, subject to final confirmation by court decree. The statute provided that in connection with proceedings before the board, the State Engineer or a qualified assistant should measure the flow of the stream involved, determine other pertinent facts, and make a report thereon which became a public record. Under the provisions of the statute, such report was accepted as *prima facie* evidence by the board. In rejecting the contention that this provision of the statute denied due process, the Court said (pp. 453-454):

"And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all and is accepted as *prima facie* evidence, but not as conclusive. . . . Considering the nature of the report and that claimants may oppose it with other evidence, it is plain that its use as evidence is not violation of due process. *Meeker v. Lehigh Valley R.R.*, 236 U. S. 412, 430."

Thus this Court held that where property rights are involved, there is no constitutional bar to a process of administrative adjudication in which independent findings of a public officer, based on his own investigation and made

without hearings, are accepted as *prima facie* proof, so long as such findings are made a public record and an opportunity is afforded to rebut them before the administrative tribunal which accepts them as presumptively true. There is therefore no occasion for discussing the question as to whether a test less strict than that laid down in the *Meeker* and *Pacific Live Stock* cases may be applied with respect to disqualification of persons for employment in the civil service of a State, in view of the absence of any constitutional right to public employment (*Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 182-183, 185 [1951]; *Garner v. Los Angeles Board*, 341 U. S. 716, 724 [1951]).

The transcript of the evidence taken at the public hearing by the Board of Regents with respect to a listed organization is a public record (New York Public Officers Law, § 66), and is available for inspection by any teacher against whom charges are preferred pursuant to the Feinberg law, or his attorney. In this respect, the Feinberg law provides greater protections than were held sufficient to meet the requirements of procedural due process in the *Pacific Live Stock* case. There no opportunity was afforded to examine a written record of the evidence on which the Engineer's report was based.

As to the phase of the Feinberg law presumption making the listing of an organization *prima facie* proof of its advocacy of violent or illegal overthrow, the cases invalidating statutory presumptions cited in plaintiffs-appellants' brief (p. 9) are not in point. None of those cases dealt with a presumption based on findings of an administrative body or official.

The Feinberg law presumption of knowledge of the nature of an organization from proof of membership therein does not in any way violate the rule that there must be a reasonable relation between a fact presumed pursuant to statute and the proven fact activating the presumption.

It is a matter of common human experience that when persons with the educational attainment required of teachers belong to an organization, they are aware of its purposes and activities. But in the case of the presump-

tion under discussion, there are added circumstances which provide every reasonable basis for making a *prima facie* inference of knowledge from membership.

The Feinberg law requires the Board of Regents, after a hearing necessarily attended by wide publicity, to determine on all the evidence presented whether any organization under inquiry advocates violent or illegal overthrow of the government. If the determination is adverse to the organization, its members have ten days after the official publication of the finding in which to become apprised of the Board's ruling. Any such event would unquestionably be publicized extensively throughout the school system and in the community at large by means of the press and other media of information.

It is manifest that the members of the organization, as well as the general public, could scarcely escape learning of its listing by the Board of Regents. Moreover, since the evidence against the organization is a public record, and would inevitably be widely reported and publicized, such evidence would become a matter of common knowledge. To presume knowledge of an organization's nature under such circumstances is merely to give *prima facie* recognition to an obvious fact.

Thus the real issue is not whether there is a reasonable basis for presuming knowledge, but whether the determination of the Board of Regents as to the nature of the organization is correct. Since a member of a listed organization, in his individual disciplinary hearing, may contest both the nature of the organization and his knowledge thereof by presenting substantial contrary evidence, and thus require the educational authorities to prove both of these elements of disqualification by a fair preponderance of the evidence, the objection to the presumption of knowledge is reduced upon analysis to a barren technical quibble. A teacher mistakenly accused of membership could adequately prepare to contest the nature of a listed organization, if he should elect to do this, by examining the transcript of the evidence in relation to such organization in advance of his disciplinary trial.

A final observation on this point seems appropriate. The presumption that a teacher knows the program and activities of organizations to which he belongs merely gives the members of the teaching profession credit for possessing the degree of discernment and understanding requisite for their calling.

4. The features of the *Garner* case legislation which the concurring and dissenting Justices there deemed constitutionally objectionable are absent from the **Feinberg Law**.

The Feinberg Law does not operate retrospectively. It provides for disqualification of teachers only on the basis of conduct knowingly engaged in, which must be proven by evidence at a hearing, with full right of judicial or administrative review. No question of bill of attainder, *ex post facto* legislation, or disqualification for past acts is therefore involved in this case.

POINT III.

The Feinberg Law is not unconstitutionally vague.

1. The terms of the Feinberg law affecting the rights of those subject to its provisions are clear and unambiguous.

By plucking the word "subversive" out of the context in which it appears in the preamble of the Feinberg law, in the Regents' rules and in the Commissioner's interpretive Memorandum, plaintiffs-appellants seek to create the impression that the Feinberg law makes the term "subversive" a standard for disqualifying teachers. It is patent that this law does not lend itself to such an interpretation.

The unfounded charge of vagueness can best be answered by pointing out that the Feinberg law nowhere makes "subversive" doctrines or "subversive" conduct a ground for listing an organization or for disqualifying a

teacher. It has been already demonstrated that the preamble of the Feinberg law is not a part of the operational provisions of the law, was not codified as a part of the Education Law, and does not prescribe grounds for disqualification (see analysis, *supra*, pp. 7-8 of this brief). The term "subversive" is used in the operational portions of the law only once and then as a designation for organizations which "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means * * *" (Education Law, § 3022, subdivision 2). The Regents' Rules and Commissioner's Memorandum nowhere provide for the disqualification of teachers for any cause other than the specific grounds set forth in the operational portions of the law. The Court of Appeals carefully considered the contention that the Feinberg law is vague and unhesitatingly rejected this argument (301 N. Y. at pp. 493-494; Record, pp. 66-67).

2. **It would be inappropriate for this Court to pass upon the constitutionality of § 3021 of the Education Law on this appeal, since this section has not been interpreted by the Court of Appeals.**

Section 3021 of the Education Law, which is implemented by the Feinberg law and which provides for the removal of teachers guilty of treasonable or seditious acts or utterances, is quoted in the opinion of the Court of Appeals in this case (301 N. Y. at p. 485; Record p. 56-57), but is not interpreted or otherwise discussed therein. The opinion of the Appellate Division herein and the opinion of the Supreme Court at Special Term do not construe or discuss § 3021. It is unnecessary in this connection to speculate concerning the views as to issues for decision, or other motivating considerations, which impelled these Courts to omit any discussion of § 3021 from their opinions, in view of the fact that the plaintiffs do not allege in their com-

plaint or otherwise show that the educational authorities are proceeding or are about to proceed against them or any other persons for their removal under § 3021. It suffices to point out that neither the Court of Appeals nor the Appellate Divisions have ever construed this section and that it has therefore never been authoritatively interpreted.

We submit that in view of the absence of an adjudication of the meaning of § 3021 by the Court of Appeals, and in the light of the authoritative precedents of this Court dealing with such situations, it would be inappropriate for this Court to pass on the constitutionality of this section on this appeal.

It has been repeatedly held by this Court that where a constitutional issue involving the interpretation of a State statute is raised before it and such statute has not been decisively construed by the State courts, the Supreme Court will refrain from passing on such constitutional issue until the statute has been authoritatively construed by State judicial decision. *Federation of Labor v. McAdory*, 325 U. S. 450, 460-462, 470-471 (1945); *Asbury Hospital v. Cass County*, 326 U. S. 207, 213-216 (1945); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546 (1914); *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 368-371 (1914); *Aero Transit Co. v. Georgia Comm'n*, 295 U. S. 285, 293-294 (1935); *Minnesota v. Probate Court*, 309 U. S. 270, 276-277 (1940); Cf. *Utah Power & L. Co. v. Pfof*, 286 U. S. 165, 186-187 (1932); *Stephenson v. Binford*, 287 U. S. 251, 276-277 (1932).

In *Federation of Labor v. McAdory*, *supra*, wherein certain labor unions brought an action in the Alabama Courts for a declaratory judgment establishing the unconstitutionality of an Alabama statute regulating labor unions, this Court unanimously refused to pass upon the constitutionality of certain provisions of the act which were attacked as void for vagueness. The ground for this ruling was that such provisions had not been authoritatively construed by the State courts and that no application of the statute to a specific set of circumstances was involved.

The highest State court had sustained the statute although the contention of indefiniteness had been urged before it. In this connection, this Court said (p. 470):

"The objection that §§ 7 and 16 of the state statute are too vague and uncertain to meet constitutional requirements is one which cannot appropriately be considered in a declaratory judgment proceeding in the federal courts, in advance of their authoritative construction by a state court. As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions."

Further explaining its rule of abstention, this Court declared (p. 471):

"The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the court. . . . It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts."

Moreover, the Court observed (*ibid.*):

"In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

Should this Court now undertake to pass upon the validity of the section, there would be no prior oppor-

tunity for the New York courts to expound its meaning and thus obviate possible constitutional objections which might otherwise be advanced against the statute. See for example, *Fox v. Washington*, 236 U. S. 273 (1915), wherein the construction given a penal statute by the highest State court was held to overcome the objection of vagueness. Cf. *Winters v. New York*, 333 U. S. 507 (1948).

The persuasive force of this consideration was strongly expressed in the *McAdory* case in the following language (325 U. S. at pp. 470-471):

"State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. * * * In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. * * * Such is not the function of the declaratory judgment."

We submit that since the instant action is a suit for a declaratory judgment involving no application of the Feinberg law or the statutes thereby implemented to any specific state of facts, the holding and reasoning of the *McAdory* case are controlling and demonstrate that the validity of § 3021 should not be adjudicated on this appeal.

3. § 3021 of the Education Law is not unconstitutionally vague.

The language of § 3021 of the Education Law* is sufficiently definite to meet any constitutional test of certainty which may be applied to a statute prescribing qualifications of fitness for teachers in public schools. It is clear from an analysis of the provisions of this statute that it provides for disqualification on the ground of commission of the specifically defined crime of treason, commission of expressly defined crimes and specific acts engendering public disorder which come within the legal definition of the term "sedition", and the making of utterances comprehended within the foregoing types of misconduct.

The terms "treason" and "sedition" have been clearly defined by legislation, judicial precedents and lexicographical authorities which plaintiffs-appellants have ignored in advancing their contention of vagueness.

A.

The Federal crime of treason is defined in Article III, § 3 of the United States Constitution and in 18 U. S. C. § 2381.** The crime of treason against the State of New York is defined in § 2380 of the Penal Law.

B.

The meaning of the term "sedition" in legal parlance is well settled. The essence of seditious conduct, as recognized by all legal definitions, is a deliberate attempt to create and use public disorder or conditions of violence as

* § 3021 (formerly § 568) was added to the Education Law by New York Laws of 1917, Chapter 416, which likewise added similar provisions to the Civil Service Law (§ 23-a) and to the Public Officers Law (§ 35-a). Chapter 416 was thus made applicable to all persons in the civil service of the State and its political subdivisions. The obvious purpose of the Act was to protect the war effort by removing from the public service persons found unfit by reason of their commission of acts embraced within the scope of the terms "treason" and "sedition".

** See the Proclamation promulgated by the President on April 16, 1917, wherein he specified various kinds of acts which have been held to be treasonable by the courts of the United States (set forth after 18 U.S.C.A. § 2381).

a means of overthrowing or opposing lawful agencies and institutions of government.

In *Black's Law Dictionary* (De Luxe Ed.) "sedition" is defined as follows:

"Sedition. An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state."

In *Arizona Pub. Co. v. Harris*, 20 Ariz. 446, 181 Pac. 373 (Sup. Ct., Ariz., 1919), the following definition was given (181 Pac. at p. 375):

" 'Sedition' has been defined to be:

'The raising of commotions and disturbances in the state; it is a revolt against legitimate authority.' 3 Bouvier's Law Dictionary, p. 3033 (Sedition)."

The Court declared that to publish of a public official that he made seditious reports

"is to charge him with the raising of commotions and disturbances in the state, and with being a destroyer of public tranquillity—guilty of acts tending to the breach of public order and safety." (181 Pac. at p. 376).

A similar meaning was assigned to the word seditious in *Wilkes v. Shields*, 62 Minn. 426, 64 N W 921 (Sup. Ct. Minn., 1895).

There are a number of specifically defined crimes which come within the scope of the term sedition. The Federal crime of seditious conspiracy, which includes conspiracies to overthrow or resist the Federal government by force, is defined in 18 U. S. C. § 2384. Section 161 of the New York State Penal Law makes it unlawful for any person to advocate the overthrow of the government by force or violence or by unlawful means, orally or in writing, and

likewise makes it a crime to organize or become a member of a group which advocates such doctrine.*

Persons who wilfully advocate the overthrow of the government by force, or who, with intent to cause such overthrow, organize a group of individuals who advocate the use of force for such purpose, or who become members of such a group, knowing its purposes, are guilty of a Federal crime under 18 U. S. C. § 2385.**

Regardless of whether given conduct of a teacher falls within the prohibitions of the above-cited statutes, if such conduct is embraced within the legal definition of sedition as stated by the courts and legal lexicographers, it necessarily demonstrates unfitness to hold employment in the public schools. It is undeniable that any person who deliberately attempts to use, create or incite violence or public disorder in this country as a means of effecting governmental change, or of opposing or obstructing the lawful processes or functions of government, does not possess the character qualifications requisite for proper performance of the duties of a teacher.

It must be borne in mind that § 3021 of the Education Law is not a criminal statute, but one which deals with the fitness and competency of persons holding positions in a most important and sensitive branch of the public service. Its phraseology is sufficiently definite to give fair notice of the prohibited conduct to any person who holds a position in the school system. Cf. *Communications Assn. v. Douds*, 339 U. S. 382, 412-413 (1950); *Dennis v. U. S.*, 341 U. S. 494, 515-516 (1951). It is submitted that the term "sedition" is no more subject to attack on the ground of vagueness than the term "crime involving moral turpitude", which was upheld by this Court as a sufficiently definite standard for deportation proceedings in *Jordan v. De George*, 341 U. S. 223, 229-232 (1951).

* In *Gilow v. New York*, 268 U.S. 652 (1925), this Court upheld the constitutionality of the provisions of this statute under which one who published matter urging forcible overthrow was convicted.

** In *Dennis v. U.S.*, 341 U.S. 494 (1951), this Court sustained the constitutionality of the provisions of this statute under which the defendants were indicted for conspiracy to organize such a group and to advocate the overthrow of the government by force.

C.

Even if § 3021 should be stricken down, the Feinberg law would remain unimpaired as an independent, efficacious instrument for the enforcement of § 12-a of the Civil Service Law. In such event, this Court would have jurisdiction to rule that the Feinberg law would remain valid and operative to that extent. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 274 (1936); *Liggett Co. v. Lee*, 288 U. S. 517, 541 (1933). And in view of the obvious capacity of the Feinberg law to function effectively and carry out its purpose independently of § 3021, such a ruling would be both appropriate and in the interests of justice.

CONCLUSION.

The Feinberg law, the Rules issued thereunder and the statutes which it implements establish reasonable and constitutionally unobjectionable standards and procedures for the preservation of the integrity and competency of the teaching staffs of the public schools. Laws establishing similar standards of fitness and more stringent procedures have been already pronounced constitutional by this Court. No invasion of academic freedom and no infringement of civil liberties results from the legislation challenged. Rather does it constitute a bulwark against totalitarian corruption of the public schools—educational institutions which occupy a key position in the structure of a democratic society.

The judgment of the New York Court of Appeals should be affirmed.

New York, December 21, 1951.

Respectfully submitted,

JENIS M. HURLEY,
Corporation Counsel of the
City of New York,
Attorney for Appellee.

MICHAEL A. CASTALDI,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
BERNARD FRIEDLANDER,
of Counsel

APPENDIX A.**CHAPTER 360, LAWS OF 1949 (THE FEINBERG LAW)**

Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens

dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby re-numbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine

that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.

3023. Liability of a board of education, trustee or trustees.

3024. Teachers responsible for record books.

3025. Verification of school registers.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any books, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or ad-

vocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

CHAPTER XV-B

SUBVERSIVE ACTIVITIES

Section 254 - Disqualification or removal of superintendents, teachers and other employees.

1 The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employees who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employee, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employee. Such report shall either (1) state that there is no evidence indicating that such teacher or other employee has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance

with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2 Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the

Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3 On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also in-

clude, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4 Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

5 This section shall take effect immediately.

COMMISSIONER'S MEMORANDUM

ON

ADMINISTRATION OF REGENT'S RULES
RELATING TO SUBVERSIVE ACTIVITIES

Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employes as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect, simply of directing attention to a special supervisory need—namely, the need “to protect the children in our state from . . . subversive influence”—which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need.

The Rules established by the Regents in response to the direction of the Legislature are largely self-explanatory. The Rules provide systematic procedures for identifying and removing from the school system disloyal teachers or other employes.

On four major points certain supplementary comments may be appropriate. These points are (1) the responsibility of the officials designated by school authorities for reporting on teachers and other employes, (2) the types of conduct which may properly be considered by school authorities as subversive within the meaning of section 3021 of the Education Law and section 12-a of the Civil Service Law, (3) the rights of a person accused of subversive activity to a hearing on charges, and (4) the listing of organizations found by the Regents to be subversive within the meaning of the law.

1 *Reports by school officials.* The officials designated by school authorities to report on teachers and other employes will face a two-fold duty. It will be their respon-

sibility, on the one hand, to help the school authorities rid the school system of persons who "use their office or position to advocate and teach subversive doctrines." On the other hand, it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive.

School authorities will need to select with great care the officials who are to be entrusted with this duty.* The officials chosen should be persons of wide acquaintance within the school system, sound judgment in matters of personal relationships, and sufficient maturity and professional experience to have won the respect of the other local officials, teachers and school employes and of the general public. Furthermore, these officials must be close enough to the work of the classroom teacher so that they will have a real understanding of the methods of presentation that may make the difference between teaching which is subversive in intent and teaching which has neither a subversive purpose nor subversive results.

In preparing the reports which they are to render to the school authorities, the designated officials will of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence. In weighing such further evidence the officials should be guided by the considerations presented in section 2 of this memorandum. Any evidence submitted to such officials which reflects adversely on a teacher, they are bound to examine promptly, dispassionately and thoroughly.

* School authorities in districts employing fewer than eight teachers will ordinarily find it advantageous to designate one or more of their own number as the official or officials to make the required reports. When there is only a single trustee in such a district, he or she will presumably make all the reports required by the Regents' Rules.

The Designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection attention is called to the *Matter of Mencher v. Chesney*, 297 N. Y. 94 (101) in which the Court of Appeals stated: "The courts have held that a false charge that one is a Communist is basis for a libel action."

2 Subversive activity. The Education Law and the Civil Service Law make it entirely clear that a teacher or other employe who "wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means," or who participates in the preparation, publication or distribution of written or printed matter advocating such a doctrine or advising its adoption, or who "organizes or helps to organize or becomes a member of any society or group of persons" which teaches or advocates such a doctrine, or who utters "any treasonable or seditious word or words" or does "any treasonable or seditious act or acts," is engaging in subversive activity and is subject to dismissal. It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children.

It must be borne in mind that teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American

form of government and American institutions, which can not in any just sense be construed as subversive. Especially if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and foreign governments (including the people and government of Russia), not for the purpose of advocating changes in our own government but for the purpose of acquainting their pupils with the kinds of government under which other peoples live.

Moreover, teachers who take full advantage of their own privileges as citizens may raise questions and make suggestions outside their classrooms, about improvements in our form of government. In addition, they may quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own.

School authorities and the officials designated in accordance with the Regents' Rules must be alert to guard such teachers against unjust accusation and condemnation. In particular, they should reject hearsay statements, or irresponsible and uncorroborated statements, about what a teacher has said or done, either in school or outside. They should examine an accused teacher's statements, writing or action in their context, and not in isolated fragments. They must insist on evidence, and not mere opinion, as a basis for any action which they may take.

But the statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.

*3 *The preferring of charges.* Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal.

4 *List of subversive organizations.* The Regents have not as yet published a list of organizations which, in accordance with Chapter 360 of the Laws of 1947, they have found to be subversive in that the said organizations "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine." Due notice will be given to school authorities of the publication of the required list. Pending its publication, school authorities are responsible for proceeding with all diligence in the cases of teachers whose acts other than membership in specified organizations fall within the purview of the statutes. They are not responsible until the list is published, for proceeding against teachers on the ground that they belong to any specified organization.

In the reports required as of October 31st, school authorities will be expected to indicate the measures which they have put into effect prior, as well as subsequent, to the publication of the Regents' list.

FRANCIS T. SPAULDING
Commissioner of Education

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

**IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, MARTA SPENCER, SAMUEL
KRIEGER, WILLIAM NEWMAN, DAVE TIGER
and EDITH TIGER,**

Appellants,

against

**THE BOARD OF EDUCATION OF THE CITY
OF NEW YORK,**

Appellee.

Appeal from the Court of Appeals of the State of New York

**BRIEF OF THE STATE OF NEW YORK
AMICUS CURIAE**

NATHANIEL L. GOLDSTEIN,
**Attorney General of the State
of New York.**

WENDELL P. BROWN,
Solicitor General,

RUTH KESSLER TOCH,
Assistant Attorney General,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN,
DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

**BRIEF OF THE STATE OF NEW YORK
AMICUS CURIAE**

Statement

This brief is filed by the State of New York by its Attorney General in support of the constitutionality of Chapter 360 of the Laws of 1949, popularly known as the Feinberg Law, which is the issue on this appeal.

The instant case was decided jointly in one opinion, upholding the constitutionality of the Feinberg Law, by the

Court of Appeals of the State of New York, together with *Thompson, et al. v. Wallin, et al.*, comprising the Board of Regents of the State of New York, and *L'Hommedieu, et al. v. Board of Regents of the State of New York*. The initial steps in administering the law are, by its provisions, committed to the Board of Regents of the State of New York.

The instant action was one of three lawsuits which were commenced at approximately the same time by different parties and under different types of procedure, all seeking the same result, that is, to have the law held unconstitutional. The law is designed to bar from employment in the public-school system of the State persons who advocate, advise and teach the doctrine that the government of the United States or of any state or political subdivision thereof should be overthrown or overturned by force, violence or unlawful means.

One of the actions was brought by Robert Thompson, as Chairman of the Communist Party of the State of New York, and William Norman, as its Secretary, against the Board of Regents of the State. Another proceeding, the *L'Hommedieu* case, was brought by five persons who were employed at the time in the public school system of the City of New York and one then retired school teacher. Respondents in the *L'Hommedieu* case were the Board of Regents of the State of New York, as in the *Thompson* case, and in addition, the Commissioner of Education of the State of New York.

Special Term, Albany County, decided the *Thompson* case and the *L'Hommedieu* case together, granting the relief prayed for (196 N. Y. Misc. 686, November, 1949). The Appellate Division of the Supreme Court, Third Department, which heard the *Thompson* and *L'Hommedieu* appeals together, unanimously reversed Special Term on

March 8, 1950, declared the Feinberg Law to be in all respects constitutional and valid, and dismissed the complaint in the *Thompson* case and the petition in the *L'Hommedieu* case (276 App. Div. 463; 494).

The third, the instant action, was brought against the Board of Education of the City of New York—the State not being made a party—by a group which included a teachers' union, other unions, teachers, taxpayers, and others. Special Term held that only the taxpayers had a justiciable controversy, a statutory action under Section 51 of the New York General Municipal Law, which permits a taxpayer to sue to prevent “any illegal official act . . . or . . . waste or injury to . . . property, funds or estate of . . . [a] municipal corporation.” The taxpayer plaintiffs were granted judgment on the pleadings (R. 2-4; 196 Misc. 873, December 1949, *sub nom. Lederman, et al. v. Board of Education of the City of New York*). The Appellate Division, Second Department, reversed Special Term and dismissed the complaint (R. 50; 276 App. Div. 527, March 27, 1950, *sub nom. Lederman, et al. v. Board of Education of the City of New York*).

The three cases were appealed to the New York Court of Appeals and were heard together by that Court. The Court of Appeals unanimously affirmed the Appellate Divisions on November 30, 1950. The one opinion embraced all three cases (R. 54; 301 N. Y. 476). The law has thus been upheld in the three lawsuits in which it has been attacked:—by the Court of Appeals, the highest Court of the State, and two Appellate Divisions of the Supreme Court of the State, the Appellate Division, Second Department, and the Appellate Division, Third Department.

An appeal was taken to this Court in the *Thompson* case in which the State Board of Regents were the appellees,

and jurisdiction was noted on June 4, 1951 (October Term, 1951, No. 13). The appeal was withdrawn, and dismissed on stipulation of counsel September 12, 1951.

The *L'Hommedieu* case was not docketed until September 10, 1951. (No. 312) and jurisdiction has not been noted as yet.

The Board of Regents has not concluded its hearings, having been restrained at the outset of the litigation from so doing and having refrained since the decision by the Appellate Division, awaiting the final outcome. Neither appellee nor any other board of education has taken any steps under the Feinberg Law.

Since the State is not a party in the instant case, it is participating in this appeal *amicus curiae* by permission.

Jurisdiction

Jurisdiction was noted in the instant case on June 4, 1951, as a companion case with the *Thompson* case.

THE PROVISIONS OF THE FEINBERG LAW AND THE STATUTES WHICH PRECEDED IT*

The Feinberg Law is not a completely new kind of law in New York State. Its purpose and policy have for many years been part of the statutory qualifications for teachers and persons in other public employment in this State.

Statutes Prior to the Feinberg Law

Since 1917, the Education Law has provided, in Section 3021, for the removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.

* The Feinberg Law and other relevant statutes are printed in full as an appendix to this brief.

Since 1939, the Civil Service Law, in Section 12-a, which appellants concede to be valid (Br. pp. 5-6, 9), has barred the appointment or retention of any person in the service of the State or of any civil division or city, including any person serving in the public school system or in any other State educational institution, who by word of mouth or writing advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or organizes or helps to organize or becomes a member of any society or group of persons which so teaches or advocates.

These statutes, unattacked since their enactment, are in fact ameliorated by the Feinberg Law.

New provisions in the Feinberg Law have the effect of giving added protection to persons whose appointment or retention in the state public school system might be in question under Section 12-a.

First, under the Feinberg Law the Board of Regents must, upon notice, conduct a hearing and thereafter list the organizations found as the result of such hearing, to advocate the overthrow of the government by force, violence or other unlawful means. Second, membership in such organization is made *prima facie* evidence only, of disqualification for appointment to or retention in any position in the public school system.

The Provisions of the Feinberg Law Notice and Hearing are Fully Provided

The operative provisions of the Feinberg Law (§ 3 of Chapter 360) constitute an amendment of the Education Law adding a new Section 3022 to that law. Subdivision 2 is the vital new provision, subdivision 1 being merely a

direction to the Board of Regents to adopt rules and regulations for the disqualification or removal of teachers and others in the public school system who violate Section 3021 of the Education Law, or who are ineligible for appointment or retention under Section 12-a of the Civil Service Law—the two laws so long on the books, unattacked.

The new provision, subdivision 2, does just this:— It directs the Board of Regents “after inquiry, and after such notice and hearing as may be appropriate,” to make a listing of organizations “which it finds to be subversive in that they advocate” the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means.

The Board of Regents is further directed by that subdivision to provide in rules and regulations that membership in any organization included in the listing made by it, shall constitute “*prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state” (emphasis supplied). The teacher has a hearing at which this *prima facie* evidence is introduced and may be refuted (Court of Appeals opinion, 301 N. Y. at p. 494; R. 67).

The Preamble of the Feinberg Law

Section 3 of Chapter 360 heretofore set forth is the actual addition by the Feinberg Law to the Education Law, as Section 3022 thereof. Section 2 of Chapter 360 is the provision renumbering former sections of the Education Law to permit a new Section 3022.

There is a Section 1 in Chapter 360 which is the preamble to the law setting forth the reasons why the Legislature enacted the law. It contains the finding and declaration

of the Legislature as to the existence of the evil which the law is designed to meet. In McKinney's Education Law it appears as a footnote under Section 3022 and is entitled "Declaration of policy."

It contains no directive to the Board of Regents or to any officer or official body. It is not a part of the provisions of the law to be administered or put into effect (Op. of Court of Appeals, 301 N. Y. at p. 493; R. 66).

Statutory Provisions for Review of Determinations of the Board of Regents and Boards of Education

Full and complete court review of any determination of the Board of Regents listing an organization, and of any determination of a board of education finding a teacher disqualified under the Feinberg Law, is available.

An organization listed by the Board of Regents, after hearing upon notice, as advocating the overthrow of the government by force, violence, or other unlawful means, has the remedy provided in New York State by Article 78 of the Civil Practice Act (Op. of Court of Appeals, 301 N. Y. at p. 493; R. 66). This is a statute providing a right of review from the determination of a body or officer "which involves an exercise of judgment or discretion" (Civil Practice Act § 1284). It is a general statute which obtains where no other remedy is specifically provided. (See *Matter of New York Edison Co. v. Maltbie*, 271 N. Y. 103, 111-112.)

A teacher found disqualified pursuant to the Feinberg Law by a board of education has an election of remedies—several methods of appeal or review from which to choose:

(1) Civil Service Law § 12-a, subd. d, specifically provides the following review procedure:

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

(2) Education Law § 310 gives the teacher the right of appeal or petition to the Commissioner of Education.

(3) Education Law § 2573, subd. 5, accords the teacher an alternative right of review in accordance with the provisions of Article 78 of the Civil Practice Act, referred to above.

In view of some of the arguments appellants make, we might, having set forth the provisions themselves, note what the law does not provide, what it is not, what it does not do."

1. The Feinberg Law does not disqualify a teacher for membership in the Communist Party or in any other organization; it merely makes *prima facie* evidence of disqualification to be a teacher, membership in an organization which, after notice and hearing, the Board of Regents ascertains to advocate the overthrow of our government by force, violence or other unlawful means. This *prima facie* evidence of disqualification the teacher has full and complete opportunity to rebut.

2. The Feinberg Law does not affect the right of association nor direct that a teacher suffer any disqualification for mere association. The disqualification

to be a teacher is for individual action, membership in an organization, after it has been found to advocate the overthrow of the government by force, being made merely *prima facie* evidence of disqualification.

3. The Feinberg Law does not affect anyone's privilege to hold, speak or publish any views, beliefs or opinions, nor the privilege of assembly, nor the privilege of petitioning the government, nor the privilege of exercising any political rights.

4. The Feinberg Law does not restrict anyone's right to join and be a member of the Communist Party or of any other organizations, even one which advocates the overthrow of the government by force.*

5. The Feinberg Law does not direct or permit the Board of Regents to find any organization to be "subversive" merely. It defines and specifies in Section 2 that it directs and permits the listing of those organizations which are found "to be subversive in that they advocate" the overthrow of the government by force, violence or other unlawful means, and those organizations only (emphasis supplied).

The law thus does not disqualify a teacher for being "subversive." The act of subversion for which he may be disqualified is defined and made specific in the law.

The Question Presented

The one issue before this Court upon this appeal is whether the Constitution prohibits a state from disqualifying for employment as teachers of children in its public

* We have, since the inception of the Feinberg Law litigations in 1949, shown *seriatim* that the law has nothing to do and has no effect whatever on rights which the plaintiffs in the actions contended it violated. It was accordingly gratifying to see Mr. Justice Jackson's reply to the claim in the *American Communications* case that it involved civil rights, freedom of speech and the press (339 U. S. at p. 134).

schools, persons found to advocate the overthrow of our government by force, violence or other unlawful means, and whether it is unconstitutional for a state to provide that membership in an organization which, it has been ascertained, after appropriate notice and hearing, advocates the overthrow of our government by force, is *prima facie* evidence of disqualification for appointment or retention as teachers in the public schools.

This, and this alone, is the issue.

The issue is not freedom of speech.

The issue is not freedom of thought.

The issue is not freedom of assembly.

The issue is not academic freedom (not of teachers and certainly not of students [Appellants' Br. p. 7]).

None of these freedoms is foreclosed by the Feinberg Law.

The issue is the narrow one presented by the narrowly drawn Feinberg Law, which makes one activity—membership in an organization which is found, after notice and hearing, to advocate the overthrow of our government by force—*prima facie* a disqualification to teach in the public schools of this State.

“To attack the straw man of ‘thought control’” (*American Communications Association v. Douds*, 339 U. S. 382, at p. 408) by posing the case as being one turning upon that issue, is to construct an issue that does not exist and with it to attempt to block out the real issue. It is “to ignore the fact that the sole effect of the statute upon one who” is found disqualified under it is the loss of position (*id.*).

To be borne in mind is the fact that there is not a constitutionally guaranteed right to public employment (*Garner v. Los Angeles Board*, 341 U. S. 716, 724) and thus no constitutionally guaranteed right to be a teacher in a public school system. Nor is there a constitutional right to advocate the overthrow of the government by force and violence (*Dennis v. United States*, 341 U. S. 494). And, we might preliminarily also recall that this Court is, of course, not concerned with the wisdom of the Feinberg Law, with the question of whether it is a good thing or not to adopt such a law. That was a consideration solely for the Legislature and not for the courts (*infra*, p. 27).

Summary of Argument

- I. A major number of appellants' arguments are directed to matters of construction of the statute and are thus foreclosed by the construction placed upon it by the highest court of the State of New York which has applied the statute so as to protect completely every constitutional right and guarantee.
- II. The Feinberg Law does not unconstitutionally infringe upon freedom of speech and assembly. It makes no restriction that this Court has not held to be constitutionally proper for our government's essential power of self-preservation.
- III. Under the Constitution assurance of "Fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it" (*Garner v. Los Angeles Board*, 341 U. S. 716), as teachers, may be required. "The Constitution does not guarantee public employment" (*Id.*).
- IV. Appellants' conjectures as to problems of defense are not a basis for attack on the constitutionality of the statute.
- V. As to appellants' argument that the law is vague.
- VI. Miscellaneous arguments which have been made in these litigations.

ARGUMENT

I.

A major number of appellants' arguments are directed to matters of construction of the statute and are thus foreclosed by the construction placed upon it by the highest court of the State of New York which has applied the statute so as to protect completely every constitutional right and guarantee.

"Of course," the construction of the statute by the highest court of the State of its enactment "is binding on this Court" (*Standard Oil Co. v. New Jersey*, 341 U. S. 428, 432).

The Court of Appeals of New York has construed the Feinberg Law

1. As providing in "subdivision 2 of the statute" that "no organization may be listed" by the Board of Regents "until 'after inquiry, and after such notice and hearing as may be appropriate'" (301 N. Y. at p. 494; also p. 493; R. 67; also R. 66).
2. As affording the organization adequate court review of any such listing, under general statutory provisions of New York, i. e., Article 78 of the New York Civil Practice Act (301 N. Y. at p. 493; R. 66).
3. As making the holding of membership "knowingly" in an organization named upon any listing for which subdivision 2 makes provision, as of the time when one "seeks to establish or retain employment in the State public school system," i. e., present, not past membership, the *prima facie* evidence of disqualification (301 N. Y. at p. 494; R. 67).

4. As importing a hearing, in the phrase "*prima facie* evidence of disqualification," at which one who seeks appointment or retention in a public school position shall be afforded an opportunity to present evidence contrary thereto (301 N. Y. at p. 494; R. 67).
5. As providing, in the *prima facie* evidence of disqualification, a presumption which remains only until substantial evidence to the contrary is offered and disappears when that is offered, unless met by further proof (301 N. Y. at p. 494; R. 67).
6. As placing—under Section 12-a, subdivision d, of the Civil Service Law—"once such contrary evidence has been received," upon the official who made the order "the burden of sustaining" its validity "by a fair preponderance of the evidence" (301 N. Y. at p. 494; R. 67).
7. As affording—under Section 12-a, subdivision d, of the Civil Service Law—the right of review to any person aggrieved by an order of ineligibility (301 N. Y. at p. 494; R. 67).
8. As giving rise to "no question of procedural due process" (301 N. Y. at p. 494; R. 67).
9. As not lacking in clarity and as not being vague (301 N. Y. at pp. 493-4; R. 66).
10. As applying to those organizations only which advocate "the overthrow of the government by violence or unlawful means" (301 N. Y. at p. 488; R. 60-61).
11. As inflicting "no punishment" "upon any organization which the Board of Regents—after hearing—

shall find advocates the overthrow of government by force or unlawful means" (301 N. Y. at p. 493; R. 66).

12. As implementing a provision of the Civil Service Law, Section 12-a (which was in existence for ten years when the Feinberg Law was enacted)—which prescribes statutory standards governing the conduct of teachers and other employees in the public school system and persons generally employed in the State civil service (301 N. Y. at pp. 484-5; 489; R. 56, 61), and whose constitutional validity appellants concede (Br. pp. 5-6, 9).

The Court of Appeals also held (301 N. Y. at p. 494; R. 67) that it found "rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State."

No argument is being made in this Court, no contention as to the meaning or effect of the provisions of the law, which was not made in the State courts, and whether mentioned in the State courts' opinions or not (*L'Hommedieu v. Board of Regents*, 276 App. Div. at p. 510), they were, of course, considered and the State courts, construing the Feinberg Law, its purpose, meaning and effect, must be presumed to have found such contentions without merit.

In *Chaplinsky v. New Hampshire*, 315 U. S. 568, where a state statute was attacked as violating the First and Fourteenth Amendments of the Constitution, this Court, in an opinion by Mr. Justice Murphy in which all concurred, said (p. 572): "The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire." Quoting the state court's declaration of the

purpose of the statute, its language and effect, this Court went on to say (pp. 573-4):

"We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to defining and punish specific conduct lying within the domain of state power . . .

. . . This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. . . .

"Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech."

Before continuing to other points of the "Argument," some statements in appellants' brief which are contrary to the facts should be noted:

Page 3— That disqualification is because of membership in an organization "alleged to be subversive."

The Fact: The provision of the law is that an organization must be *established*, after "notice and hearing," to be subversive *in that it advocates* the overthrow of the government by force before it may be listed.

Pages 6, 8— That the regulations command severance of relations with a listed organization within ten days on pain of loss of position.

The Fact: The effect of the regulation (Regulation No. 2) is that it is not even *prima facie* evidence of disqualification if membership in a listed organization is severed within ten days

of the listing; and continued membership is but *prima facie* evidence of disqualification. A teacher has a hearing at which he has opportunity to rebut this *prima facie* evidence. The applicable provision of the regulation (R. 23-4) is: "Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification"

Page 8— That the *Garner* case is distinguishable because the California charter required awareness of the character of the organization; that this Court interpolated the conception *knowingly* in the oath.

The Fact: The Feinberg Law, and it was so interpreted by the Court of Appeals, "makes it clear that" the disqualification is for "knowingly" holding membership in an organization listed (301 N. Y. at p. 494; R. 67).

Page 10— That the law makes no distinction between past and present membership.

The Fact: The Feinberg Law, and it was so interpreted by the Court of Appeals, "makes it clear that" it is membership at the time when one "seeks to establish or retain employment in the State public school system" that operates as a *prima facie* disqualification (301 N. Y. at p. 494; R. 67).

We might also here make a general observation concerning appellants' argument. It appears to be chiefly an ex-

pression of dislike of the law as restrictive, and an effort at *in terrorem* argument, so to speak, as to freedom of speech and assembly. Their legal objections are indefinite and their statements frequently inconsistent. Ultimately they indicate that there is no issue as to the purpose of the law but that Section 12-a of the Civil Service Law would "adequately take care of such persons" (Br. p. 9). They accept as valid the provision of Section 12-a of the Civil Service Law which—in their words—"disqualifies employees who belong to organizations" which advocate the overthrow of the government by force. This they grant is analogous to the charter amendment held valid in the *Garner* case (Br. pp. 5-6). They finally come down to contending that "the issue" is "whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field has declared advocate the overthrow of the government by force" (Br. p. 9). We submit that that question presents no issue of constitutionality before this Court. Specifically, to what official or agency of the State, the Legislature might entrust the promulgation of the list of organizations is, of course, a State matter (*Neblett v. Carpenter*, 305 U. S. 297, 300).

II

The Feinberg Law does not unconstitutionally infringe upon freedom of speech and assembly. It makes no restriction that this Court has not held to be constitutionally proper for our Government's essential power of self-preservation.

This Court has recently reaffirmed the principle which it has ever maintained; that there must be accommodation of the individual liberties and freedom guaranteed by the Constitution to the unexpendable power of the government of

these United States, under which those liberties and freedom are possible, in order to preserve its existence against those who directly and immediately, or indirectly and by slow, termite process, would destroy it.

Chief Justice Vinson's opinion in *Dennis v. United States* stated that principle thus (341 U. S. at pp. 501, 503, 508):

"We reject any principle of governmental helplessness in the face of preparation for revolution, which principle carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. . . . An analysis of the leading cases in this Court which have involved direct limitations on speech . . . will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

. . . .

" Nothing is more certain in modern society than the principle that there are no absolutes, To those who would paralyze our Government in the face of impending threat . . . we must reply that all concepts are relative."

Mr. Justice Frankfurter's opinion in that case expressed the same thought in different language (at pp. 519, 521).

Appellants urge (Br. p. 5) that "This Court must look at the objectives of the challenged legislation and its impact on freedom." Exactly so. It was by "striking a balance" (Mr. Justice Jackson in *Dennis v. United States*, *supra*, at p. 561) between individual unrestrained freedom and the protection of the freedom of all, which is represented in the objectives of the statute here attacked, and to preserve the existence of our government which provides that freedom, that this Court sustained the constitutionality of the

Smith Act, and held that the latter must prevail. Precisely by a like striking of a balance between these two interests, did this Court in *American Communications Association v. Douds* sustain the constitutionality of the non-Communist oath provision of the Taft-Hartley Law, saying (339 U. S. at pp. 394, 398, 399-400):

"Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts.

"* * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. * * * We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' *Cox v. New Hampshire*, *supra*, at 574.

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. * * *

"* * * legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights. *Reynolds v. United States*, *supra*; *Prince v. Massachusetts*, *supra*; *Cox v. New Hampshire*, *supra*; *Giboney v. Empire Storage Co.*, *supra*."

In that case the restriction affected union leaders. This Court's opinion weighed the public against the individual interest, and deciding in favor of the paramount public interest, said (at p. 400):

"In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership."

The "objectives" of the Feinberg Law at which appellants want this Court to look, "the obvious purpose of the statute" (*Dennis v. United States*; *supra*, at p. 501) "is to protect existing Government" (*id.*) by preventing those who would "change [it] by violence, revolution and terrorism," (*id.*) from being the teachers of our children.

To avoid overlapping, the particular menace of the employment of persons of such persuasion as teachers will be left to the next point (III); where will be discussed the constitutional power of the State to adopt a law such as this governing its employees.

We recall here Mr. Justice Holmes' injunction in *Noble State Bank v. Haskell*, 219 U. S. 104, 110-111:

"* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by

the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

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"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The absence of anything in the Feinberg Law restricting freedom of speech and assembly has already been pointed out *supra*. "In the light of present-day actualities" (*American Communications Association v. Douds*, 339 U. S. *supra*, at p. 435), the problem which the New York Legislature was obliged to face "realistically" (*Dennis v. United States*, *supra*, at p. 569) was that of invasion of the public school system of the state by an evil force which, tragically, has been found to have also invaded other facets of American life (*id.* p. 564): the infiltration and penetration into the public school system of part of the network which seeks to accomplish the overthrow of our government by force and violence, when the time is ripe, by using positions in strategic places to subtly disseminate its doctrines and build and extend its fifth column by gaining adherents to its cause (*Dennis v. United States*, *supra*, at pp. 501-11, 534-35, 567, 577; *American Communications Association v. Douds*, *supra*, at pp. 388-9, 429-433).

If to cope with that acute threat, the Feinberg Law does have an "impact upon freedom" of the individual, the rulings of this Court, here cited, are direct, specific authority that it is constitutionally permissible and that the law is entirely valid.

III

Under the Constitution assurance of "fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it" (*Garner v. Los Angeles Board*, 341 U. S. 716), as teachers, may be required.

"The Constitution does not guarantee public employment" (*id.*).

The Feinberg Law deals with but one subject; does just one thing (cf. *American Communications Association v. Douds*, 339 U. S. at p. 404): It provides a disqualification for public employment and a very special kind of public employment, that of teachers of our children, to whom (in the words of the preamble to the law) "the children look for guidance, authority and leadership."

This Court's decisions in the *Gerende* case (341 U. S. 56) and the *Garner* case (341 U. S. 716) upheld the constitutionality of laws "establishing an employment qualification of loyalty to the State and the United States" (*Garner v. Los Angeles Board*, 341 U. S. at p. 721, also p. 730).

Appellants (Br. Point II) argue against the provision in the Feinberg Law, that membership in a listed organization shall be *prima facie* evidence of disqualification, upon the ground that such membership has no rational connection with fitness to teach.

"The *Gerende*, *Garner* and *American Communications* cases rest upon the premise that it does.

"It can hardly be doubted," said Chief Justice Vinson in the *American Communications* case (339 U. S. at pp.

391-392), "that voluntary affiliations* and beliefs justify * * * [an] inference" "concerning future conduct," and "provide rational ground for the legislative judgment that those persons proscribed * * * would be subject to 'tempting opportunities' to commit acts deemed harmful [to the national economy]." He cited *Board of Governors v. Agnew*, 329 U. S. 441, and applied the reasoning which led to the conclusion in that case, viz: "Because of their business connections, carrying as they do certain loyalties, interests and disciplines, those persons were thought to pose a *continuing threat* of participation in the harmful activities described above" (emphasis supplied).

Where the subject is not union leaders (involved in the *American Communications* case), but teachers, the threat is not merely to the economy. It is to that on which the economy rests. The threat lies in their influence upon the children who will soon have the power to shape the destiny and form of our government. Chief Justice Vinson's words in pointing out why it is essential that the "threat," the "continuing danger" (at p. 393) be removed are even more pertinent to the task of dealing with the threat of teachers who advocate the overthrow of the government by force (p. 406):

"* * * the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that * * * [the law making body] should not be powerless to remove the threat, not limited to punishing the act."

* The act of affiliation is an "overt act" (id. p. 411). The greater danger in united and joint action is recognized by this Court. And by outstanding liberals. As the late Harold J. Laski wrote:

"It is clear that no state charged with the maintenance of social order can admit of an unlimited right to freedom of association; for that would be to tolerate the existence of bodies actively engaged in an effort to seek its own overthrow by violence" ("Freedom of Association," *Encyclopedia of the Social Sciences*, Vol. VI, p. 449).

And see page 405; setting forth the holding in *United Public Workers v. Mitchell*, 330 U. S. 75. See also *Garner v. Los Angeles Board*, *supra*, at pp. 720, 725.

The Feinberg Law, "narrowly drawn," of "limited scope" (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 573; *Cox v. New Hampshire*, 312 U. S. 569, 572), with all procedural protection assured (*supra* I), is surely least questionable of all the laws which "the context of our time." (*Garner v. Los Angeles Board*, 341 U. S. at p. 725) has compelled the Congress and state legislatures to adopt for the preservation of our country, and which this Court has upheld.

The *Gerende* case unanimously affirmed the decision of the Maryland Court of Appeals upholding the validity of the provision of the Ober Law, requiring candidates for public office in that state in order to obtain a place on the ballot, to make oath that he is not engaged in one way or another in the attempt to overthrow the government by force or violence and that he is not knowingly a member of an organization engaged in such an attempt. This Court pointed out that it had the assurance of the Attorney General of Maryland, based upon the state court's construction of the law, that he would advise the proper authorities to accept an oath in such terms.

The *Garner* case also upheld an oath and affidavit statute and ordinance.

The *American Communications* case, still another oath case, involved a statute which affects something less than public employment—union leaders—but which this Court found justified the requirement of the oath in the public interest because of the influence of union leaders on the public economy.

The Feinberg Law is not an oath statute. It does not require an oath of all who seek to obtain or retain a position in the public school system of the State. It provides for the existence of *prima facie* evidence of advocacy of the overthrow of the government by force or violence in the individual's membership in an organization found after notice and hearing to so advocate. And it provides for a hearing at which such *prima facie* evidence may be rebutted.

The Particular Need for Assurance of Fidelity of Teachers

Teachers would be the first to affirm and the last to decry the extent of their influence upon the children who come under their instruction. Prose and verse have sung of it and courts have ruled upon that premise:

"Teachers are supposed not only to impart instruction in the classroom but by their example to teach the students. * * * Academic freedom cannot authorize a teacher to teach that murder or *treason* are good. * * * [the teacher's] very presence as a teacher will cause the students to look up to him, seek to know more about him, and the more he is able to charm them and impress them with his personal presence, the more potent will grow his influence in all spheres of their lives, causing the students in many instances to strive to emulate him in every respect." *Matter of Kay v. Board of Higher Education, New York City*, 173 Misc. 943, 947, 951, aff'd, 259 App. Div. 879; leave to app. den. 284 N. Y. 819 (emphasis supplied).

To accord to children the benefit of the influence of teachers and their teaching is the whole purpose of formal education, the purpose of the extensive system of public schools in this country. In the teacher's power rests, not as in the case of union leaders (involved in the *American Communications* case), the coloring or diverting of opinions of adults whose views, attitudes and beliefs have already

been formed, but the seeding of the first ideas which make enduring impression upon virgin minds, and the shaping of the basic beliefs of today's children, who will be the ones to determine the destiny of our nation.

Apart from teaching at home—and there is division of opinion (like it or not) as to which has the greater impact—we learn of country, of our government, of our history, from our teachers. How would these be taught by a teacher who advocates that the government should be overthrown by force? Grant that a teacher so advocating would be cautious enough not to make statements to that effect outright, we know that it is not necessary to project a thought or attitude by direct statements. There are indirect, subtle, insinuating ways; by what is left unsaid as well as by what is said.

To turn from the natural feelings of loyalty to one's country, to advocate that one's government should be overthrown by force, requires great depth of belief in that doctrine and profound desire to gain adherents to it. It is to stamp the teacher a mechanical thing to say that a belief so strong will not affect his approach to the subjects he teaches, will not affect his teachings.

Beyond that,—this Court has had told in records before it in recent years, the dedicated devotion to their cause of adherents to such doctrines, their clandestine methods of dissemination of these doctrines, their purpose and success in infiltrating into strategic posts where they may promote their cause, the requirement that in every facet of life that promotion of their cause is the one prevailing purpose, the fact that their stressed objective is the recruiting of followers and adherents to the cause (*Dennis v. United States*, *supra*, at pp. 498, 510-11, 547, 564-5, 567, 577; *American Communications Association v. Douds*, *supra*, at pp. 431-433, 424-431).

What more fertile field for such recruiting than in the schools? The hope of those who advocate that our government should be overthrown by force is in the coming generation and in the teachers who share their views; in the power of teachers to influence the coming generation. The fact that their call is not to uprising at this time but in the future, bespeaks the truth of what we say here.

Like the Hitler technique, the Communist technique is to concentrate particularly on the capture of the mind of youth and thus insure the ultimate success of their cause, if not in this generation, then in the next one. The Berlin Festival of Youth during this last summer set before the world the spectacle of the purposefulness of this goal and of the success it has already achieved. May we not provide that the missionaries for such causes shall not be teachers of our children in our public schools, shall not be the "keepers of that arsenal"? (Cf. *American Communications Association v. Douds*, *supra*, at p. 412.) That is the "rational basis" for the presumption provided in the Feinberg Law.

The desirability and necessity for the Feinberg Law thus should be beyond doubt. Appellants, to be sure, do not think it a good law (Br. p. 7).

But, as this Court has said and repeated, the necessity for or desirability of a law is not a question for the courts, but for the legislative body which enacted it (*Dennis v. United States*, *supra*, at pp. 525, 539-40, 548; *Garner v. Los Angeles Board*, *supra*, at pp. 400-1; *United Public Workers v. Mitchell*, *supra*, 330 U. S. at pp. 95, 102).

Appellants urge that Section 12-a of the New York Civil Service Law "adequately takes care of" (Br. p. 9) the problem of eliminating as teachers persons whom the Fein-

berg Law is designed to reach. Whether or not a particular statute is needed to deal with the situation in the light of existing statutes is likewise for the Legislature, and its judgment as to that too, courts will not disturb (*Dunne v. United States*, 138 F. (2d) 137, 143; cert. den. 320 U. S. 790; rehearing den. 320 U. S. 814; second petition for rehearing den. 320 U. S. 815).

Appellants have injected into their brief (p. 7) references to a miscellany of lay opinion as to current campus attitudes in the realm of expression of ideas; the attitude of students, indeed, whom of course the Feinberg Law does not concern (cf. *Dennis v. United States*, 341 U. S. at p. 502). Why such attitudes have developed, if they have, appellants do not say. They do not attribute them obviously to the Feinberg Law. As we have said and shown, there is not a thing in the Feinberg Law which touches academic freedom, which stops a teacher from discussing anything. "The very language" of the law "negates the interpretation" appellants place upon it. "It is directed at advocacy, not discussion" (*Dennis v. United States*, *supra*, at p. 502; cf. p. 501). By all means children should be informed as to what ideas are abroad, what are the systems of government under which other peoples of the world live; let them learn the virtues of those systems as well as their failings. Let them learn of the shortcomings of our government.* What the Feinberg Law aims at is that the teachers who give this information shall be persons who do not advocate the overthrow of our own government by force or violence.

In the light of the matter which appears on page 7 of appellants' brief, we might note that teachers themselves, the most interested and vigilantly jealous guardians of

* See R. 27-8, Commissioner of Education's Memorandum on Administration of Regents' Rules.

"academic freedom," have found that eliminating communist penetration into the teaching field is not only compatible with that freedom, but essential to it. The National Education Association of the United States,* at its 88th annual Representative Assembly in July 1950, adopted the following amendment to its bylaws:

"* * * no person shall be admitted or continued in membership in the NEA who advocates or who is a member of the Communist Party of the United States or of any organization that advocates changing the form of government of the United States by any means not provided for in the Constitution of the United States."

The report, to the same Assembly, by the Educational Policies Commission** accurately clarifies the issue:

"We reaffirm with emphasis that membership in the Communist Party and in the teaching profession are irreconcilable. Such membership involves adherence to doctrines and disciplines completely inconsistent with the principles of freedom on which American education depends."

The program of the Educational Policies Commission presented by its Chairman, Dr. John K. Norton, Professor of Education, Teachers College, Columbia University, to the Assembly in July 1950 of the National Education Association of the United States, declared:

* The National Education Association of the United States is a national organization of teachers, numbering about 450,000 members and an affiliated membership of about 900,000.

** "The Educational Policies Commission was established jointly by the National Education Association and the American Association of School Administrators. In addition to representing these organizations, it also includes a representative from the Departments of Classroom Teachers, of Higher Education, of Elementary School Principals, and of Secondary School Principals" (as described in the report of the Commission to the July, 1950 Representative Assembly of the National Education Association).

"At our convention in Boston a year ago, the Commission proposed that membership in the Communist party and in the teaching profession were not reconcilable. . . . this proposal . . . was officially and overwhelmingly approved by action of the Resolutions Committee and the Representative Assembly of the National Education Association.

"Time is proving that this is one of the soundest and wisest positions ever taken at a convention of the National Education Association.

"Even more clearly than a year ago we see that the question in this whole matter is not one of civil rights.

"Rather, the issue is the position of our profession as to the proper qualifications of its members.

. . . .

"The issue, therefore, is not—Do Communists have legal rights?

. . . .

"Rather, the question is—Do persons who have pledged themselves to the objectives and the tactics of the Communist party have the qualifications for teaching which teachers are willing to accept? . . .

"Also, the past year has made clearer the fallacy of the 'guilt by association' argument used by those who would permit members of the Communist party to teach our children and youth.

"The fallacy in this argument is that membership in the Communist party is a radically different commitment than is membership in a free party in a free society.

"To be a Republican or a Democrat does not require acceptance of iron discipline and unflagging obedience in executing the orders of party leaders. . . .

"The Communist party member does accept these things and more. He becomes the agent of the party.

"In short, the Communist party member does far more than associate himself with a party as the term is understood in a free society. He makes a dedicated commitment to accept the discipline, both in thought and action, laid down by a little group of cynical and unscrupulous men, . . . espousing ideals and methods which are the antithesis of Democracy. . . .

"To join such a movement is more than association. It is active cooperation, with moral degradation thrown in to boot!"

Demonstrating the currency of the problem in the eyes of teachers themselves, on December 11, 1951 the New York State Association of Secondary School Principals and on December 3, 1951, the New York State Association of Elementary School Principals each adopted resolutions at their annual conventions in Syracuse, N. Y. for continuance of their efforts to prevent employment of teachers advocating "ideologies such as Communism" (The New York Times, December 12, 1951; Syracuse Post Standard, December 3 and 4, 1951).

An eminent educator, Dr. Sidney Hook, Chairman of the Philosophy and Psychology Division of New York University's Graduate School, rests the disqualification of "the Communist Party teacher" upon "his declaration of intention, as evidenced by official statements of his party, to practice educational fraud," with neither academic freedom nor civil rights entering into the issue. Says Dr. Hook:

"An individual joins an organization which explicitly instructs him that his duty is to sabotage the purposes of the institution in which he works and which provides him with his livelihood. Is it necessary to apprehend him in the act of carrying out these instructions in order to forestall the sabotage? Does not his voluntary and continuous act of membership in such an organization constitute *prima facie* evidence of unfitness?"

The perfect method to leave the loyal American teacher free to discuss any doctrines and to state any opinions, without fear of irresponsible attack upon him, is to eliminate the disloyal teacher by procedure such as is provided in the Feinberg Law.

* The New York Times Magazine, July 9, 1950, p. 39.

IV

Appellants' conjectures as to problems of defense are not a basis for attack on the constitutionality of the statute.

Appellants, at pages 10-11 of their brief, envisage problems of defense that would confront a teacher upon a hearing before a board of education.

First should be noted that there is no foundation for some statements appellants make in this connection. One such statement is that the hearings before the Board of Regents would be "presumably secret" (Br. p. 11). The answer is that the hearings would be public, of course. The one hearing which the Regents held before they were stayed by these litigations was public.

Appellants also say that a teacher would have no way of knowing what considerations led the Regents to list an organization (Br. p. 11). Certainly a teacher would know. The minutes of the hearing would be a public record and available.

Moreover, anticipation of problems of proof is not a basis for an attack upon the constitutionality of the statute itself, which is all that is before the Court at this time:

"Impossibility of proof may not be assumed. * * * Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 208-210. *Petitioner's contention as to impossibility of proof is premature.*" (*Aniston Mfg. Co. v. Davis*, 301 U. S. 337 at pp. 352-3; see also pp. 345-6, 356-7; emphasis supplied.)

And see *Federation of Labor v. McAdory*, 325 U. S. 450, 469.

Only the statute as written is to be considered at this time, not any problems of proof, not any questions of ad-

ministration of the law, not the regulations (cases *supra* and *American Power Co. v. S. E. C.*, 329 U. S. 90, 108; *United States v. Petrillo*, 332 U. S. 1, 11-12; *Minnesota v. Probate Court*, 309 U. S. 270, 275, 277).

Due process is scrupulously provided in the Feinberg Law in notice, hearing and judicial review. No element of due process is denied in the law. That is all with which the Court at this time will concern itself (cases *supra*).

V

As to appellants' argument that the law is vague.

Appellants, although they entitle their Point III in general terms, actually are arguing only that Section 3021 is vague and conclude their point (Br. Point III, p. 14) by asking that Section 3021 and the new law, "insofar as it rests on this older one," should be declared unconstitutional. That, this Court of course could do if there were a basis for it. Subdivision 1 of § 3022 of the law implements § 3021, by directing the Board of Regents to adopt rules and regulations for its enforcement. That is the only reference in the Feinberg Law to § 3021. The crux of the Feinberg Law is subdivision 2 of Section 3022, which provides for the listing of an organization by the Board of Regents, after notice and hearing, for advocacy of the overthrow of the government by force, and declares that membership in an organization so listed shall be *prima facie* evidence of disqualification for office or position in the public schools. Section 3021 could, as appellants ask, be disapproved, if grounds therefor existed, and the balance of the Feinberg Law upheld (cf. *Dennis v. United States*, *supra*, at p. 542). However, the argument of vagueness was made to the State courts which, construing the statute, found "no lack of clarity in the operative clause," i. e., subdivision 2 of Section 3022 (301 N. Y. at p. 493; R. 66).

It is to be borne in mind that the Feinberg Law is not a criminal statute (cf. *American Communications Association v. Douds*, *supra*, at pp. 412-413). The only result of the operation of the Feinberg Law is the possible "loss of a particular position," which, as this Court said in the last cited case (p. 409), "is not the loss of life or liberty."

But even in the *American Communications* case, where there is a criminal penalty for the making of a false oath, this Court said (339 U. S. at p. 412):

"The argument as to vagueness stresses the breadth of such terms as 'affiliated,' 'supports' and 'illegal or unconstitutional methods.' There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

And in the *Dennis* case where the Smith Act, which is a criminal statute of course, was claimed to be vague, this Court said (341 U. S. at pp. 515, 516):

"There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. * * *

"We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. * * * We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. * * * Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the

scrupulous care demanded by our Constitution. But we are not convinced that *because there may be borderline cases at some time in the future*, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute." (emphasis supplied)

That a "borderline" or "peripheral" case (*Jordan v. DeGeorge*, 341 U. S. 223, at p. 232) may at some time arise which might present doubt as to whether a teacher had violated Section 3021 does not condemn the statute itself. No case is before the Court now and unconstitutional application of the law will not be presumed "while Courts sit" (see *American Communications Association v. Douds*, *supra*, at p. 410, quoting Mr. Justice Holmes in *Panhandle Oil Co. v. Knox*, 277 U. S. 218, 223).

VI

Miscellaneous arguments which have been made in these litigations.

In the course of the three litigations involving the Feinberg Law, various other arguments were made as the cases moved through the State courts. The courts found the law not attackable on any of such grounds and indeed appellants in the instant appeal apparently agree for they do not make similar arguments here. However, we shall consider two of them very briefly in this Point.

A

Bill of Attainder

The Court of Appeals construing the Feinberg Law held that it "has none of the legal characteristics of a bill of attainder" (301 N. Y. at p. 493; R. 66). Its complete statement on this point was as follows:

"The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups 'and particularly of the communist party' have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

"A bill of attainder has been defined as '... a legislative act which inflicts punishment without a judicial trial.' (*Cummings v. Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly v. Village of Owego*, 45 How. Prac. 219; 257.) Furthermore, a textual examination of the provisions of the Feinberg Law—section 3022—in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn. v. Douds*, *supra*, pp. 413-414). In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a

proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder." (301 N. Y. at pp. 492-3)

The answers of this Court to the bill of attainder arguments in the *Garner* case and *American Communications* case are the definitive answer to any bill of attainder argument as to the Feinberg Law.

In the *Garner* case, Mr. Justice Clark said (341 U. S. at p. 722):

"We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

In the *American Communications* case, Chief Justice Vinson's opinion said as to the bill of attainder argument (339 U. S. at pp. 413-414):

"The unions' argument as to bill of attainder cites the familiar cases, *United States v. Lovett*, 328 U. S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946); *Ex parte Garland* (U. S.) 4 Wall. 333, 18 L. Ed. 366 (1866); *Cummings v. Missouri* (U. S.) 4 Wall. 277, 18 L. Ed. 356 (1866). Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action." (emphasis by the Court)

B

The permissive provision in the statute allowing the use of material or evidence made available to the Board of Regents by Federal agencies.

The provision in the statute permitting the Board of Regents to utilize listings compiled by a Federal agency was probably not necessary. But it is, of course, merely a source of information to the Board of Regents in making its inquiry. Without this provision, the Board of Regents, an administrative body, would have been free to avail itself of such material in making its inquiry (e. g., *Long Island Lighting Co. v. Maltbie*, 176 Misc. 1, 5, aff'd, 262 App. Div. 376, aff'd, 287 N. Y. 691; *Matter of Long Beach Gas Co. v. Maltbie*, 264 App. Div. 496, 503, aff'd, 290 N. Y. 572; *Eagles v. Samuels* [1946], 329 U. S. 304, 313, 316). The courts upon judicial review will insure that the use made thereof does not violate the constitutional rights of those against whom it is used.

Moreover, the Board of Regents in their first hearing (further hearings having been stayed by the litigations) demonstrated the discriminating use that would be made of the Federal lists. They gave five organizations notice of hearing in order to reach a determination as to whether such organizations advocated the overthrow of the government by force, whereas there are some 160 or more on the Federal list compiled under the President's Executive Order.

Conclusion

"Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right . . . to put some limitation upon expression. Such are the paradoxes of life" (Mr. Justice Frankfurter in *Dennis v. United States*, *supra*, at p. 550).

It is not complacent indifference to any curtailment of freedom of action or expression but that vigilance which is the price of liberty, which compels, sometimes, the taking of measures, having perhaps the effect of causing individuals who hold or desire specific occupations, to pause in the exercise of certain of their guaranteed freedoms (cf. *Dennis v. United States*, *supra*, at p. 532; *American Communications Association v. Douds*, 339 U. S. at pp. 389, 333, 403-4).

It has been said that freedom dies with every individual and is not reborn with his successors but must be achieved anew, generation by generation. That is why those who would wipe out freedom regard "The Crucial Battle For The World's Youth"* as among the most important in their warfare, if not the most important.

They are fully aware that the adult of today still has his heritage, experience and love of freedom; that he soberly measures therewith the doctrines that the advocates and agents of violent overthrow of our government propound. Not so youth, with its enthusiasm, without that background or experience.

If when this generation is gone the one that rises to take its place will have been schooled by those who bear no

* In The New York Times Magazine section of November 18, 1951 appeared a most significant article so entitled by Barbara Ward, former foreign editor of The Economist of London, and a provocative British writer on world affairs.

"fidelity to the very presuppositions of our scheme of government," that government which "we seek to maintain and further" will vanish. And we will have done it by our own hand by having permitted our Constitution to become "a suicide pact" (*Terminiello v. Chicago*, 337 U. S. 1, 37, quoted in *American Communications Association v. Douds*, *supra*, p. 409), by having permitted it "to serve as a protecting screen for those who while claiming its privileges" (*Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 414) will have destroyed it.

The disciplined agents of organizations advocating the overthrow of our government by force and violence are not free to think or speak as they will (*supra*, point III). Those who may be teachers, any more than those who are labor leaders or who follow any other occupations. On the contrary, they are under compulsion not to speak truth, but only that which will lead or mislead into their fold. It is not academic freedom that would be protected by preventing their elimination from the schools. The freedom they would gain or retain is the freedom to influence children in their ways, with all the power of influence that a teacher wields by the mere fact that he is the teacher.

Academic freedom, freedom of speech, free expression of honest thought and belief of all complexions, can continue to flourish and to flourish in truth, only when teachers—if such there be—who have no "fidelity" to our government where men and women have this freedom, but who actually advocate its overthrow by force, are eliminated as teachers. That is all the Feinberg Law seeks to accomplish, providing the ensurance and protection of every element of due process.

The decision of the Court of Appeals of New York should be affirmed and the Feinberg Law declared to be in all respects constitutional.

December 12, 1951.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York.

WENDELL P. BROWN,
Solicitor General,

RUTH KESSLER TOCH,
Assistant Attorney General,
Of Counsel.

Appendix

TEXT OF RELEVANT STATUTES

THE FEINBERG LAW

(Chapter 360, Laws of 1949)

Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate, and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to pro-

tect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three; three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible

for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima-facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description

of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.

3023. Liability of a board of education, trustee or trustees.

3024. Teachers responsible for record books.

3025. Verification of school register.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or

v

any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or.

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

EDUCATION LAW

" § 310. *Appeals or petitions to commissioner of education and other proceedings.*

"Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever.* Such appeal or petition may be made in consequence of any action:

• • •

"7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

EDUCATION LAW

" § 2573. *Appointment of assistant, district or other superintendents, teachers and other employees; their salaries, et cetera.*

"5. • • • Any person conceiving himself aggrieved may review the determination of said board either by an appeal to the commissioner of education, as provided for by article seven of this chapter, or in accordance with the provisions of article seven of this chapter, or in accordance with the provisions of article seventy-eight of the civil practice act. If such person elect to institute a proceeding under the civil practice act, the determination of such board shall, for the purpose of such proceeding, be deemed final. • • •"

* Notwithstanding this broad language, a determination of the Commissioner of Education will be reviewed and annulled by the Courts if found to be malicious or arbitrary. *Bullock v. Cooley*, 225 N. Y. 566, 577-578; *Matter of Fabricius v. Graves*, 174 Misc. 130, 133, affd. 260 App. Div. 981, appeal from unanimous affirmance dismissed on ground no constitutional question presented. 285 N. Y. 610.

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Supreme Court of the United States
OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, MARTA SPENCER, SAMUEL
KRIEGER, WILLIAM NEWMAN, DAVE TIGER and
EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK,

Appellee.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION, AS AMICUS CURIAE**

R. LAWRENCE SIEGEL,
*Counsel to the American Civil Liberties
Union, as Amicus Curiae,*
55 Liberty Street,
New York 5, N. Y.

R. LAWRENCE SIEGEL,
DOROTHY KENYON,
RAYMOND L. WISE,
HERBERT MONTE LEVE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE
TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

This brief amicus is filed by the American Civil Liberties Union pursuant to consent of the parties.

The Union is a nation-wide, non-political organization, whose members are persons interested in preserving the fundamental rights guaranteed to individuals by the Constitution and Bill of Rights. It attempts to intervene in litigation involving threats to our basic freedoms, irrespective of whether those immediately threatened are Communists, Fascists, or persons embracing other hated ideologies. For the history of freedom teaches the Union that a menace to the freedom of any person, no matter who he is or what he believes or stands for, independent

of how detestable he or his views may be, jeopardizes the freedom of all of us.

As a champion of civil liberties the Union is opposed to any governmental, political or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or the single-party state, or any movement in support of them. In opposing such dictatorial, totalitarian systems, the Union takes no position on their economic, social or political practices or policies not affecting civil liberties.

For almost thirty years, the American Civil Liberties Union through its Committee on Academic Freedom has been active in the defense of the civil liberties and academic freedom of teachers, students and educational institutions wherever infractions have arisen. In such cases, it tries to speak for the public interest in intellectual freedom.

The Amicus believes that the democratic American answer to totalitarianism, the Communistic type or otherwise, does not lie in the abridgment of any traditional liberties. Such abridgment is logical only in a police state, as Russia is, and as Nazi Germany and Fascist Italy were before they fell, but it is alien to democratic America. Therefore, Americans must be continually alert that in meeting the challenge of Communism or of any other threat to democracy, Americans do not resort to authoritarian methods and measures, for the adoption of such practices would constitute by themselves a defeat for American democracy and a victory for our totalitarian enemies.

It believes that the tragedy of the Feinberg Law is that it plays into the hands of the very persons against whom it is directed, the Communists. Undoubtedly it is part of the Communist strategy to frighten us into abandoning instead of advancing our democracy. By enacting the Feinberg Law, we are adopting the work and techniques of

the anti-democrats, aping the type of actions we oppose. (See, Statement by President James B. Conant of Harvard University before the Joint Committee on Education of the Massachusetts Legislature at a hearing on February 9, 1948 on a bill to prohibit employment of Communists as teachers.) It is undoubtedly for this reason that the Feinberg Law has been opposed by numerous persons and organizations including Professor Sidney Hook, John Dewey, the United Parents Association, the New York Times, the New York Herald-Tribune.

Underlying the Feinberg Law and its loyalty reports provision, is the regrettable circumstance that fear of Communism is driving sincere-minded Americans to confuse any desire for, or any interest in, political, social or economic changes with subversive activity, and to consider anyone, particularly a teacher, advocating or examining such changes or ideas, to be in all probability a Communist or fellow-traveler. The implications of this erroneous thinking are catastrophic. It creates an atmosphere favorable to Communism. It identifies Russia with social change, while it arbitrarily limits us to the *status quo*. It concedes the Communist claim of concern over the underprivileged, while it negates the substantial achievements and promise of American democracy in their behalf. It gives the Communists, in short, an undeserved propaganda victory over us.

Because of these beliefs, the Union sought consent to intervene here. The Amicus is concerned over the Feinberg Law and the rules and regulations promulgated thereunder, because on their face and in their inevitable effect, they threaten to impair democratic education and to stifle free thought and its unfettered communication in the public schools of New York State, and through emulation by other states, in the public schools throughout the country.

The Statutes Involved

This case involves a constitutional challenge of the Feinberg Law, Chapter 360 of the Laws of 1949 of New York, which enacted Education Law Section 3022.

The Feinberg Law supplements and implements two antecedent statutes. One, Education Law Section 3021, enacted in 1947, provides for removal of a public school employee for uttering any treasonable or seditious word or doing any treasonable or seditious act. The other prior statute, Civil Service Law, Section 12-a, added in 1939, bars employment in the public schools to any person who advocates, advises or teaches the overthrow of the government by any unlawful means or who organizes or becomes a member of a group teaching or advocating such a doctrine.

The Feinberg Law contains a legislative finding, or "common report," that members of subversive groups, particularly of the Communist party and its affiliated organizations, have "infiltrated" into the public schools, despite existing laws. The results are "that subversive propaganda can be disseminated among children of tender years by those who teach them"; said teachers are frequently bound "to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry"; the dissemination of their "propaganda may be and frequently is sufficiently subtle to escape detection in the classroom." To protect children from "such subversive influence" it is essential that the laws "prohibiting persons who are members of subversive groups" from employment in the public schools "be rigorously enforced." The state board of regents are therefore admonished "to take affirmative action to meet this grave menace and to report thereon regularly" to the state

legislature. The regents are instructed to adopt and enforce rules and regulations for the disqualification or removal of school superintendents, teachers or employees who violate the two antecedent statutes or the Feinberg Law. The regents are directed "after inquiry and after such notice and hearing as may be appropriate" to make a listing of "subversive" organizations. "Membership in any such organization * * * shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state."

The rules adopted by the regents for implementing the law provide that prior to the hiring of a school employee, inquiry shall be made of such "persons as may be in a position to furnish pertinent information" whether he "is known to have violated the aforesaid statutory provisions". Loyalty reports on each employee are required of school authorities, who are to institute removal proceedings "in those cases in which in their judgment the evidence indicates violation of the statutory provisions". Evidence of membership in any organization ten days after listing by the regents as "subversive" shall "constitute *prima facie* evidence" of disqualification for employment.

The memorandum of the Commissioner of Education on the administration of the regents' rules declares that these rules "provide systematic procedures for identifying and removing from the school system disloyal" employees. It further provides that in preparing loyalty reports, reporting "officials will of course use their own acquaintance with the teachers * * * as an immediate guide"; if "well acquainted" with the teachers on whom they are reporting "they will already be in possession of pertinent facts either to substantiate their judgment of a teacher's loyalty" or "to indicate the need for further evidence".

"Subversive activity" is "treasonable" or "subversive" action inside or outside the classroom or school, not limited to word of mouth. It may be the "writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others".

School authorities are advised that "teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American form of government and American institutions, which can not in any just sense be construed as subversive. Especially, if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and foreign governments (including the people and government of Russia)". Teachers, as citizens, "may raise questions and make suggestions outside their classrooms, about improvements in our form of government" and "quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own".

Scope of the Argument

The Amicus considers the Feinberg Law and its implementary rules and guides from the point of view of their effect upon civil liberties and academic freedom within the public schools, particularly in regard to their effect upon teachers, students and the public school system, and specifically upon teachers, who are the principal subjects of the Feinberg Law and the administrative provisions thereunder.

ARGUMENT

POINT I

The Feinberg Law and its related rules and regulations and memorandum abridge fundamental personal freedoms guaranteed by the Constitution of the United States and the Bill of Rights.

The vice of the Feinberg Law is that it unleashes a continuous series of successive annual invasions of fundamental rights. It curtails freedom of thought, speech and association, amounts to a bill of attainder and an ex post facto law, and establishes unfair procedures for determining individual guilt. The law is also arbitrary, incapable of objective application because it is vague and uncertain, and creates unreasonable presumptions of guilt.

It is our belief that whether a teacher should be permitted to teach in the public schools does not depend on his ideologies and associations, but upon the integrity of his work within and without the classroom, inside the public school system. The critical question to us is whether the teacher has made the classroom a platform for indoctrination of anti-democratic or non-democratic ideas, or the public school a place for propagandizing alien ideologies. If he has, he has abused and misused his position and consequently is unfit to teach. A teacher who presents to his students purported facts and values distorted to conform to Communist Party doctrine or to any other dogma, or who perverts his position within the public school system to foster in the students' minds his undemocratic ideas or to proselytize for undemocratic ideologies is not a teacher but a propaganda agent and therefore is

guilty of misconduct. He should be disciplined, whether a Communist, Fascist, or otherwise.

In determining whether a teacher is guilty of misconduct, as just defined, even if he is a Communist, he still is entitled to all the basic personal protections of freedom of speech, thought and association, guaranteed everybody by the Constitution and the Bill of Rights. This means in concrete terms that a person may not be disqualified or discharged as a teacher from the public school system unless certain principles are observed, namely: his case must be judged separately on its own facts and in terms of deeds, not mere beliefs or associations; his guilt must be personal and cannot arise from association with an organization that is legal during the association. His guilt may not be attributed to the holding of an opinion or a view on politics, economics, religion or some other subject, or even to intent in the absence of an overt act. *De Jonge v. Oregon*, 299 U. S. 353; *Schneiderman v. United States*, 320 U. S. 118.

The Feinberg Law is a departure from the foregoing principles. The danger inherent in permitting any breach of these elementary democratic ideas was dramatically illustrated recently within the State of New Mexico, where a vicious anti-Catholic movement assumed the shape of a move to disqualify members of Catholic religious orders from teaching in the state public schools. We, as Amicus, vigorously opposed this measure, and were upheld by the New Mexico Supreme Court. *Zellers v. Huff*, — N. M. —, No. 5332, Sept. 20, 1951. (See, Brief of American Civil Liberties Union, *Amicus Curiae*, Point I; see *New Leader*, October 8, 1951, pp. 6-8).

This case does not involve the right of the State of New York to determine who shall teach its children, which

right is conceded here. The law undertakes to disqualify certain persons from employment as teachers within the public school system by tests which bear no necessary relationship to the advancement of the public welfare in that they are not standards connected with fitness to teach. These tests are, in fact, in adverse relationship to the public interest, by their inevitable tendency to disrupt the public schools, intimidate the teaching profession, lower the quality of learning, and stifle democratic education. Therefore, to disqualify persons from teaching under such tests is to flout due process. *People v. Crane*, 214 N. Y. 154 (1915), states the rule in these cogent words:

"* * * we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state * * *. We do not hold that it may discriminate among its citizens on the ground of faith or color * * *. For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared *disqualified* from service, unless the proscription bears some relation to the advancement of the public welfare." (at 167)

The Feinberg Law assumes that the New York public schools are honeycombed with Communists and fellow-travellers. This assumption is made by the statute on "common report." This "report" is at odds, however, with the available facts, which indicate that Communist teachers do not constitute a "present danger" to the people of New York State. Dr. William Jansen, the New York City Super-

intendent of Schools, publicly testified in September 1949 that there were very few Communists in the public schools (New York Times, September 29, 1949, p. 1). It is not likely that the number has increased or stayed the same since then as the lessons of events have continued to define the intellectual and moral dishonesty of Communism, its political insincerity and opportunism, its economic and social shortcomings, its religious repressions. Nor is there any reason to believe that the public schools within the state, outside of New York City, are over-run with Communists. The Communist Party and its ideology never have made appreciable headway in America. The genius of our people, rooted in deep respect for the dignity of the individual, has barred in this country the growth of any totalitarian philosophy. It is a fair suspicion that we tend to exaggerate the importance and strength of a group which has failed to capture any appreciable following in this country and which, as Budenz and other ex-Communists have disclosed, loses many members and sympathizers over the course of the years. (See, Schlesinger, What About Communism, Public Affairs Pamphlet No. 164, p. 27.) Should Communists ever become a real threat here, appropriate timely counter-action undoubtedly would be taken by our government. The Federal Bureau of Investigation most certainly seems alerted to every step and movement of the Party and its cohorts. None of the decisive factors obtain in America which permitted the success abroad of Communistic fifth column activities and government coup d'etats. Finally, there is no doubt of the ability of the school system to take appropriate and timely action in the event the few Communist teachers were to undertake subversive activity within the school system at the command of the Party at some future date. The school system is not a loose,

amorphous group but a centralized and organized body whose vigilant and expert supervisors and administrators are constantly aware of the activity within the schools and fully empowered to take effective and seasonable steps upon a modicum of evidence pointing to improper action. (Cf. *American Communications Association v. Douds*, 339 U.S. 382.)

Few Communists are due to be eliminated, even though the Commissioner describes the regents rules as providing "systematic procedures for identifying and removing from the School System disloyal" persons. Communists are old hands at evasion and subterfuge. (On the difficulty of identifying Communists, see *Report of the Sub-Committee of the Joint Legislative Committee to Investigate Procedures and Methods of Allocating State Moneys for Public School Purposes and Subversive Activities*, Leg. Doc. (1942) No. 49, p. 13.) Many victims of the screenings are likely to be liberals, progressives and others who express deviant or unpopular views or ideas. Theirs are apt to be the dangerous heresies and unorthodoxies exposed and punished, at the expense of curtailed opportunity for developing youths capable of becoming discriminating adults. It is to be noted, moreover, that the application of the Feinberg Law carries with it the danger that students may grow accustomed to spying, censorship, suppression and the fear of speaking freely and independently as normal in a democracy. This would be a disaster for the American way of life which depends for its preservation on the public school as a training ground for young Americans devoted to democratic principles.

We are afraid that the mischief which will flow from the Feinberg Law is greater than the gravity of the evil we face in adhering to traditional democratic principles

and in continuing to judge all persons, even Communists, on their deeds and actions, not on their anticipated conduct alone. The law makes a shambles of the principle of freedom. It is no answer to assert that the unfettered preservation of all our liberties is a subordinate consideration to the need for rooting out Communists. The American conception of civil liberties, as Mr. Justice Holmes emphasized, is that the test of its validity is its functioning in times of crisis and its application to unpopular people, not in its utilization only in ordinary times or cases. (See, *Abrams v. United States*, 250 U.S. 616, 624 at 630 (1919), Holmes, J., dissenting.)

We do not overlook the intimation of the Court below that the constitutional rights of freedom of intellect and of association of a teacher may be abridged as a condition of his employment in the public schools. This view rests of course upon the old dictum of Mr. Justice Holmes in *McAuliffe v. New Bedford*, 155 Mass. 216, 220, and the decision in *United Public Workers v. Mitchell*, 330 U. S. 75. Neither case, however, is in point here, since neither dealt with expression of opinion or the right of association. Both were concerned with partisan political activities and on their facts clearly are irrelevant. Moreover, in *United States v. Thayer*, 209 U. S. 39, Mr. Justice Holmes himself indicated that his earlier statement in the *McAuliffe* case was not intended to be taken literally, for he pointed out that even office-holders might have constitutional rights, which the legislature could not restrict (209 U. S. at 42). And in the *Mitchell* case, the majority opinion recognized that government employees could not be deprived of their freedoms, outside the area of partisan political activity, nor disqualified merely for membership in a political party.

And, in *Garner v. Los Angeles*, 341 U. S. 716, 725, Mr. Justice Frankfurter indicated that there are limitations to state activity conditioning public employment:

"The Constitution does not guarantee public employment * * *"

"But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority; nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem."

The Feinberg Law and its implementary rules completely disregard the fact that teachers in their capacity of citizens have the same rights of free expression as others who are not teachers, and that the state may not restrict the enjoyment of these rights by prying into the private lives of teachers. By becoming a teacher a person is not deemed to have sacrificed any of his rights as a citizen. He does not relinquish the liberty to be as free as any other person to participate, in his private capacity, in political, economic or religious movements, or other lawful activities, and to hold and express publicly, outside the school system, his views for ideas concerning politics, economics, international affairs, religion, or anything else. This is not a qualified privilege which may be revoked if certain conditions are not fulfilled. It is fundamental in a democracy that teachers have the right to speak and write as men of independence, and that students have the

right to be taught by men of independent mind. The Feinberg Law is deaf to the clamor of these rights.

Nor is it an answer, we think, to say merely that a Communist, or a person in sympathy with Communism, is necessarily incompetent to be a teacher since he is not in a position to teach the truth and pursue free inquiry, inasmuch as he is subject to a rigid and ruthless discipline. Ignoring whether in a democracy there is a truth we desire our teachers to teach and our young to learn, it is to be noted that the assumption that a Communist teacher necessarily will not pursue truth and free inquiry does not square with the logic of experience, however much it seems compelling in theory. The premise was belied in the cases of several of the University of Washington professors tried on their Communist beliefs and associations (*Report of University of Washington Committee on Tenure and Academic Freedom to President Raymond B. Allen, January 7, 1949*). In the case of the eight public school teachers recently tried in New York City before Trial Examiner Theodore Kiendl, the record showed cumulatively 162 years of teaching service in the public school system, or an average tenure of twenty and one-quarter years, without any proof of incompetence or indoctrinating practice on their part. The teaching records of none of the eight, as teachers, were challenged; none were charged with or shown to have rendered unsatisfactory performance of their duties, or to have attempted indoctrination of their students, or with teaching of the Communist Party line, dogma or doctrine, or with disregard of truth or free inquiry. (Record in *In the Matter of the trial of the charges presented by Dr. William Jansen, Superintendent of Schools, against Miss Alice B. Citron, et al.*, before the Board of Education of the City of New York, October, 1950.) Both the University of

Washington and the New York City Board of Education trials tend to show there is no indissoluble link between a teacher's dogmas and associations, on the one hand, even if he is a Communist, and the actual rendition of his teaching functions, on the other. Dogmatists are not likely to be the richest contributors to our intellectual progress, but there are unfortunately many dogmatists in our society and some undoubtedly teach in the public schools. A search for teachers removable upon any such criterion might conceivably embrace many public school teachers who are not Communists. The only workable test of a teacher's efficiency must be his record inside the classroom and within the school system; it cannot rest only on membership in the Communist Party. The test imposed by the Feinberg Law is not dogmatism but "subversiveness"; and the statute with its vague standards will definitely strike at unorthodox thinking while dogmatists will be caught only tangentially, if at all.

1. The law and its administrative rules and memorandum unreasonably invade the spirit of free intellect which the First Amendment reserves from all official control.

Because freedom of thought is a "preferred" freedom, the customary presumption of constitutionality does not attach to a law challenged for abridging this fundamental right. *Thomas v. Collins*, 323 U. S. 516, 529-30 (1945); *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940); *Schneider v. State*, 308 U. S. 147, 161 (1939); *Murdock v. Penn.*, 319 U. S. 105, 115 (1943). The inference drawn is against the propriety of legislative intrusion into this domain. It is a realm free from official control except in the case of a public emergency.

The Feinberg Law is not an emergency measure; it is not required by "clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas v. Collins*, 323 U. S., at 530. Limitations on freedom of thought are constitutional only where the substantive evil is extremely serious (*Bridges v. California*, 314 U. S. 252, 263). In such case, the legislation must be "narrowly drawn to prevent the supposed evil." *Cantwell v. State of Conn.*, 310 U. S. 296, 307. Here, the statute is a dragnet which can encompass all ideas and views.

The law leaves open the widest conceivable inquiry into ideas and views, the scope of which no one can foresee. The statute fails to give fair notice of what acts and expressions will be punishable. Under the vague and subjective tests of the law, which in its administration envisages a great number of reporters and judges of "subversive", "disloyal", "seditious" and "treasonable" acts and words, the expression of all unpopular or dissentient views becomes dangerous. As many definitions of these words may develop as there are reporters and judges. Inasmuch as we have never been able to arrive at satisfactory definitions, there is good reason to be apprehensive. Mr. Justice Jackson, when Attorney General, correctly summed up the uncertainty and shifting in meaning of the term "subversive" in these words:

"Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be effected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive'." (Speech to conference of United States Attorneys, April 1, 1940.)

The law brings within its orbit activity which the Constitution renders inviolate. *Winters v. New York*, 333 U. S. 507. It proscribes activity far short of advocacy of violent overthrow of the government. It restricts by its reach the advocacy or discussion of peaceful political, economic and social change. Yet these are lawful activities in which many distinguished Americans have engaged.

In its findings the law states that the dissemination of "subversive" propaganda "may be and frequently is sufficiently subtle to escape detection in the classroom". It mentions the difficulty of measuring the menace of subversive infiltration by conduct in the classroom alone. Together with the loose definition of "subversive", this finding foreshadows a drive on unorthodox political, social and economic views of teachers, both inside and outside the classroom.

The inquiries indicated in the memorandum of the Commissioner of Education are in realms which inevitably invite subjective judgments.

To a marked degree the law approaches the licensing of ideas, since it may result in a situation where no person can teach with a sense of security unless his ideas and associations in his opinion will be palatable to his judge(s). Such censorship does not have its roots in democracy. Democracy is built not on a fixed creed or on a system of regimented ideas but on the sure knowledge that there are no privileged or fixed ideas. The drafters of the law overlooked the fact that teachers enjoy intellectual freedom not for themselves alone but primarily for the sake of the students. The law therefore hurts students since it is certain that teachers will censor their teaching themselves so as to avoid controversial matters and ideas, in spite of the attempt by the Commissioner of Education in his memorandum to prescribe what the teacher

"honestly concerned to help their pupils to become constructive citizens", particularly "teachers of history, civics or government" may properly discuss or teach without violating the statute. Teachers have learned from the history of their profession that in caution there is tenure.

It should be noted that in all likelihood, some non-Communist teachers will leave their profession rather than submit to the policing of their professional and private activities. Submission to such investigation may offend many loyal teachers on the ground that to single out their profession for widespread investigation in itself stigmatizes and discriminates against them. Submission of their private lives to investigation certainly will be irksome to public school employees. John Lord O'Brian noted the effect of such policing in the course of adversely criticizing the federal loyalty program on this ground:

"What anxieties of mind, what prolonged periods of worry, what restraint upon their initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence." (Loyalty Tests and Guilt by Association, 61 Harv. L. R. 592, 608 (1948).)

In those several regrettable instances in the past when our government has invaded the freedoms of our people in the course of fighting "seditious activity", we have failed to accomplish our ends and later have admitted our mistakes and have been ashamed of our lapses. Again to impair our freedoms is to court real danger to the democratic American philosophy.

2. The Feinberg Law is in the nature of a bill of attainder and an *ex post facto* law.

The Feinberg Law is *ex post facto* and a bill of attainder. *Garner v. Los Angeles*, 341 U. S. 716. There, for the majority, Mr. Justice Clark said that the ordinance under challenge "would be *ex post facto* if it imposed punishment for past conduct lawful at the time it was engaged in" (at 721); and in defining bills of attainder, declared that "punishment is a prerequisite" and "Whether legislative action curtaining a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation'." *Id.* at 722. (Citing *Cummings v. Missouri*, 4 Wall 277, 320 (1867).) Application of these definitions here condemns the Feinberg Law.

The Feinberg Law and its complementary regulations permit punishment for past advocacy or associations legal at the time engaged in, which may now be deemed subversive activity, namely, "The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity." The Feinberg Law therefore violates the constitutional prohibition against *ex post facto* laws. *Ex parte Garland*, 4 Wall 333.

Proscription by administrative action from the opportunity to follow a chosen profession in government service, without the safeguards of a judicial trial, is punishment constitutionally forbidden as a bill of attainder [*United States v. Lovett*, 328 U. S., 303, 316] where it is not based upon "general and prospectively operative standards of qualification or eligibility for public employment" *Garner v. Los Angeles*, 341 U. S. at 723. The standards in the case at bar are not merely prospectively operative but retroactive too; moreover they are so vague and uncertain

as to amount to no standards at all in the determination of fitness for public employment.

The statute denies employment to members of ascertainable groups, "the communist party and its affiliated organizations". In the *Lovett* case, the Court stated the rule to be that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution" (at 315-316). In the *Lovett* case too, it was sought to bar certain so-called "subversives" from public office. The Supreme Court condemned the Congressional enactment as a bill of attainder. See, *Cummings v. Missouri*, 4 Wall 277; and *Ex parte Garland*, 4 Wall 333.

Considering all "the circumstances attending and the causes of the deprivation" of the privilege of public school employment [*Garner v. Los Angeles*, 341 U. S. at 722], the Feinberg Law amounts to a bill of attainder. Denial of the right to teach in the public schools is *punishment* because removal under the Feinberg Law in the circumstances of our times not only denies a person the right to follow a chosen profession but probably debars such person, in addition, from all other public employment, and the opportunity to engage in private employment. The mode with which such punishment is inflicted, namely by subjective administrative action under vague and uncertain legislative standards emphasizes the attainder here.

3. The Feinberg Law adopts the repugnant principle of guilt by association.

The law makes mere membership in an organization on the proscribed list in and by itself *prima facie* grounds for dismissal. This is contrary to our tradition and law:

"No principle is more firmly embodied in Anglo-American legal tradition than the principle that guilt is personal; no doctrine more odious than the doctrine of guilt by association, unless it is the analogous doctrine of guilt by intention. Those doctrines were the darlings of the Nazi and Fascist states; they are today the effective weapons of every communist state. If we adopt these tyrannical weapons we have in fact succumbed to the philosophy which justifies them and no victory that communism could possibly secure at the polls or elsewhere would be as spectacular as the victory it would thus secure by foisting upon us its odious legal doctrines." (*Henry Steele Commager*, *New York Times*, Sunday Magazine Section, September 22, 1948, "Should We Outlaw The Communist Party". See *Bridges v. Wixon*, 326 U. S. 135, 163; *Kotteakos v. United States*, 328 U. S. 750, 772.)

Some of the reasons for rejection of the guilt by association doctrine by Anglo-Americans were well stated by Lord Macaulay more than a century ago (1828) in his essay on Hallam's "Constitutional History" where he made these remarks concerning Queen Elizabeth's action against the Catholics in England in the Sixteenth Century:

"To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrine with him, that he will commit a crime, is persecution, and is, in every case, foolish and wicked * * * (We should not have) accused her government of persecution for passing any law, however severe, against overt acts of sedition. But to argue that, because a man is a Catholic, he must think it right

to murder a heretical sovereign, and that because he thinks it right he will attempt to do it, and then, to found on this conclusion a law for punishing him as if he had done it, is plain persecution * * *. If, indeed, all men reasoned in the same manner on the same data, and always did what they thought it their duty to do, this mode of dispensing justice might be extremely judicious. But as people who agree about premises often disagree about conclusions, and as no man in the world acts up to his own standard of right, there are two enormous gaps in the logic by which alone penalties for opinions can be defended. * * *. Man, in short, is so inconsistent a creature that it is impossible to reason from his belief to his conduct, or from one part of his belief to another."

In the leading Supreme Court cases in which the doctrine of guilt by association was rejected, the Court held that since guilt is personal the nature of the organization is irrelevant. *De Jonge v. Oregon*, 299 U. S. 353; *Schneiderman v. United States*, 320 U. S. 118. Here, the legislation seeks to make its finding as to the nature of the organization(s) conclusive without any specific proof, seeks to bar any evidence as to the organization(s) character, and in fact makes the doctrine of guilt by association absolute. In consequence, in order to avoid the stigma of disloyalty, and its disastrous effects, it is to be expected that teachers may avoid any association which purports to deal with political, social, or economic matters. Such would be the better part of wisdom. But it is not to the advantage of their personality or to that of our society.

In the apt words of Mr. Justice Frankfurter in *Garner v. Los Angeles*, 341 U. S. 716, 728:

"The needs of security do not require such curbs on what may well be innocuous feelings and associa-

tions. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

And just before making these cogent remarks, the same Justice had made the following observations, which are likewise applicable here:

"Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining'." (at pp. 727-8). See, Sutherland, *British Trials for Disloyal Association During the French Revolution*, 34 Cornell Law Quarterly 303 (1949).

Application of the doctrine of "guilt by association" is a denial of due process of law. Even if the Regents should grant a hearing to a listed organization and prove that it is "subversive", it would still not be a sufficient basis for a finding that any particular teacher who is a member of that organization is "subversive". To go yet

further and to prevent the teacher from showing that the organization is *not* "subversive" is doubly offensive and flagrantly violates due process of law.

In 1920, when political fears and tensions likewise eventuated in repressive measures against freedom of thought and association, Charles Evans Hughes, Morgan J. O'Brien, Louis Marshall, Joseph M. Proskauer and Ogden L. Mills, acting as a Special Committee of the Association of the Bar of the City of New York protested adoption of the doctrine of guilt by association by the New York Assembly in expelling five members of the Socialist Party, declaring that "it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts * * *" (*Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York*, 5 N. Y. Legis. Doc. No. 30, 143rd Sess. 4 (1920)). The principle they espoused indicts the statute here under consideration.

4. The Feinberg Law is a vague and indefinite statute and therefore incapable of being objectively applied.

The Feinberg Law speaks of "subversive" persons, "subversive" propaganda, and the regents' rules, of "subversive activities." Words like "subversive" and "subversive activities" are so vague as to have a limitless range and variety of meanings for different people. The effect of the law and the regents' rules, therefore, is that no person to whom it applies knows in any real sense what he may or may not do or what he may or may not say, and no person charged with the administration or enforcement of the law and the rules knows precisely to whom and to what it applies. See *Fick Wo v. Hopkins*, 118 U. S. 356, 373.

Statutes and regulations which inflict sanctions under standards so vague and indefinite violate the due process clause (*Cline v. Frink Dairy Co.*, 274 U. S. 445), especially when rights guaranteed under the First Amendment are involved (*Winters v. New York*, 333 U. S. 507, 509-510; *Stromberg v. California*, 283 U. S. 359, 369; *Herndon v. Lowry*, 301 U. S. 242, 258; *United States v. Cohen Grocery Co.*, 255 U. S. 81). Also see, *Musser v. Utah*, 333 U. S. 95.

In none of the foregoing cases was the offense set forth in language as broad, vague and ambiguous as in the Feinberg Law; in each case, the statute made an attempt to set forth with precision what particular conduct or what particular advocacy was forbidden. But here, there is no effort at precision. The law amounts to a dragnet which may enmesh anyone who suggests or discusses a change of government or shows any interest in the form of government of other countries. Its scope is beyond realization. The law and the rules apply not only to the school and the classroom, but to "subversive activity" according to the memorandum of the Commissioner of Education (including "the writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others") "outside the school" and not merely "by word of mouth". The teacher therefore must not only be sure that a "suggestion for reform" or the expression of an opinion in the classroom is not "subversive" but he must also be sure that such a suggestion or expression is not "subversive" before he makes it at a social or other gathering or meeting or elsewhere. Such sweeping vagueness and indefiniteness, interfering with freedom of the human mind, are violations of due process of law. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, concurring opinion of Douglas, J., at pp. 176-177.)

"No one can tell from the Executive Order what meaning is intended. No one can tell from the records of the cases which one the Attorney General applied. The charge is flexible; it will mean one thing to one officer, another to someone else. It will be given meaning according to the predilections of the prosecutor: 'subversive' to some will be synonymous with 'radical'; 'subversive' to others will be synonymous with 'communist.' It can be expanded to include those who depart from the orthodox party line—to those whose words and actions (though completely loyal) do not conform to the orthodox view on foreign or domestic policy. These flexible standards, which vary with the mood or political philosophy of the prosecutor, are weapons which can be made as sharp or as blunt as the occasion requires. Since they are subject to grave abuse, they have no place in our system of law. When we employ them, we plant within our body politic the virus of the totalitarian ideology which we oppose.

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws not of men. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him. . . . When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

5. It creates a new presumption of guilt contrary to constitutional principles.

The Feinberg Law provides that the regents' rules must make "membership in any such organization included in

such listing made by it * * * prima facie evidence of disqualification * * *." *Prima facie* evidence has been defined by the Supreme Court of the United States to be "sufficient evidence to outweigh the presumption of innocence, and if not met by opposing evidence, to support a verdict of guilty." (*Bailey v. Alabama*, 219 U. S. 219 at 234.) In the case cited, Mr. Justice Hughes for the Court said further:

"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe" (219 U. S. at 239).

The Feinberg Law, therefore, creates a new and unprecedented presumption—that a teacher, a member of an organization listed by the regents as "subversive" after such hearings as the Board may deem "appropriate", is himself guilty of advocating the overthrow of the government by force, violence or other unlawful means, and such a teacher is then subject to the serious consequences provided in the statute and to the disgrace of dismissal under it. The law, it follows, does not satisfy the requirements for constitutionality of a statutory presumption as set forth by Mr. Justice Hughes in *Bailey v. Alabama*; it makes a "purely arbitrary" inference; there is a lack of "rational relation" between the fact of membership and the inferred fact of advocacy of overthrow of the government; it deprives the accused teacher of "a proper opportunity to submit all the facts bearing upon the issue" (*Id.* at 238).

The statutes in existence prior to the enactment of the Feinberg Law, viz., Section 302 of the Education Law and Section 12-a of the Civil Service Law, create no such presumption. Section 3021 of the Education Law provides for removal on the ground of a treasonable or seditious "utterance" or deed by the individual teacher; Section 12-a of the Civil Service Law provides specifically:

"The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

The opinion of Mr. Justice Hearn here below at Special Term (196 Misc. 873, 881) is noteworthy on the point under discussion:

"Is there any reasonable connection, under these circumstances, between the fact supposedly 'proved' and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the Government eleven months to establish in the recent trial in the United States District Court (Southern District, New York) before Judge Medina in the case of *United States v. Foster?*" (*Lederman v. Board of Education of City of N. Y.*, 196 Misc., at 881, Sup. Ct., Spec. Term, Kings Co., 1949 [reversed, 276 A. D. 527, 2d Dept., 1950].)

"The cumulative effect of the procedure as outlined then is this: At an 'appropriate' hearing by the Board of Regents (an administrative body)

an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hearing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire prima facie case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's nonreviewable hearing and finding which was ex parte and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination 'in good faith'. Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilt from mere membership, without any proof of personal guilt—the teacher's personal nonguilt in fact being irrelevant where the only charge is membership.

"It does not appear to this court that these procedures add up to 'those fundamental requirements of fairness which are of the essence of due process.' (*Morgan v. United States*, 304 U. S. 1, 19, *supra*)."
(*Id.* at 885.)

6. It will hurt public education through its adverse effect upon freedom of teaching and learning in the public school system.

America has staked a great deal upon the public school system in its effort to preserve a democracy of free men. *Prince v. Massachusetts*, 321 U. S. 158, 168. In its plan and operation, the public school is an organization in which democracy should be the pervading influence at every level; the system rests on freedom in administration, teaching

and learning. The Feinberg Law tends to disrupt that system. The search for "subversives" which the statute will sponsor will be concentrated on ferreting out and eliminating "subversive" propaganda, influence and activities. The entire school system will be involved in the widespread hunt. The cost to public education of this pursuit of "subversive" teachers will be very great, in terms of setbacks in the quality of teaching and learning, without adequate return to the public.

Teachers are bound to be watched, spied on and informed upon, and tried under a variety of standards and definitions of "subversive" conduct. They will be spied upon outside of the school as well as within. Principals, teachers, pupils, and parents may turn into informers. School administrators will be converted into special prosecutors of persons suspected of disloyalty, a task for which they have no training. The chase after subversive public school employees, which the statute when applied may inaugurate, is bound to be infinitely more difficult than the detection of improper indoctrinative or other wrongful practices by a teacher or other public school employee whenever they occur, which can be taken care of under the usual supervisory procedure of the school system. The resulting spy apparatus and trial system which the Feinberg Law will bring in practice is a grave threat to the morale of the public school teaching force. In consequence, teaching and learning may retrogress perceptibly. In a democracy dependent for its lifeblood on young persons trained in the public schools to meet all problems, including those which are controversial, this imminent deterioration in the quality of public education may prove to be greater and more lasting in its harm than the Communist threat in the public schools which the Feinberg Law undertook to solve.

Under the law loyalty reports are to be made not once but annually. The standards for determining loyalty are imprecise and necessarily subjective. Since, in the preparation of loyalty reports, conclusions may be based upon private opinions and preconceived judgments of the reporters, there will be opportunity for those who are tempted to exercise their great power to become tyrannical or arbitrary while fear and supineness may develop in wholesale proportions within the ranks of the teachers in order to avoid any conduct which might make them victims of a trial on the stated charge of disloyalty.

The loyalty reports will depend in great part upon information supplied by informers. The danger of proceeding against persons on the basis of information supplied by informers was recently set forth by Mr. Justice Jackson in a relevant discussion on the question of security:

"Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in the procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Cf. *Re Oliver*, 333 U. S. 257, 268, 92 L. ed. 682, 691, 68 S. Ct. 499." (*United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537.)

Yet proceedings based upon secret reports are to be expected in addition to the cases where persons will be accused of disloyalty by sincere judges mistaking non-conformism or liberalism for subversive conduct.

CONCLUSION

The basic idea of America is a workshop in liberty. It is this idea which pervades the public schools. The Fejnberg Law is the very antithesis of this idea. It is not in the tradition of freedom but in the spirit of censorship, repression, thought conformity, and official orthodoxy. It will threaten the public schools of New York and cause serious harm to public education. If the law stands, it will have effects upon other states and other occupations and professions. The net gain to our country will be small at best. On the other hand, the law confers a boon upon the totalitarians it essays to oppose. It makes continuous inroads against the liberties of teachers and other public school employees and it cannot withstand constitutional scrutiny.

Respectfully submitted,

R. LAWRENCE SIEGEL,
*Counsel to the American Civil Liberties
 Union, as Amicus Curiae.*

R. LAWRENCE SIEGEL,
 DOROTHY KENYON,
 RAYMOND L. WISE,
 HERBERT MONTE LEVY,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK
FRIEDLANDER, MARTA SPENCER, SAMUEL
KRIEGER, WILLIAM NEWMAN, DAVE TIGER
and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY
OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

**SUPPLEMENTAL BRIEF OF THE STATE OF
NEW YORK AMICUS CURIAE**

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York.

WENDELL P. BROWN,
Solicitor General,

RUTH KESSLER TOCH,
Assistant Attorney General,

Of Counsel.

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**SUPPLEMENTAL BRIEF OF THE STATE OF
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Statement

This supplemental brief is being filed upon the suggestion made at the oral argument by Mr. Justice Frankfurter, to consider a rule of the Board of Regents* which was discussed at the argument.

It had not been referred to in appellants' briefs.

* The Board of Regents is the body which has jurisdiction and supervision of the educational system in the State of New York, of the schools, institutions of higher education, and the professions (other than the legal profession). The Board at present has 13 members, the maximum permissible number, one chosen each year by the Legislature for a 13-year term. It must have at least 9 members. It has been in existence since 1784 (New York Constitution, Article XI, § 2; Education Law, Article 5).

Argument

The rule which was the subject of discussion (Rule 1) concerns the enforcement of Section 3021 of the Education Law and of Section 12-a of the Civil Service Law (see opening paragraph of the rule, R. 22). Section 12-a of the Civil Service Law is clearly constitutional under this Court's decisions in the *Gerende* and *Garner* cases, and is so conceded by appellants (Br. pp. 6-8, Reply Br. p. 1). As has been pointed out in our main brief, the validity of Section 3021 of the Education Law does not appear to be before the Court on this appeal. In any event, it is not a part of the operative provisions of the Feinberg Law and, as conceded by appellants (main brief p. 14), is separable from the other provisions of the Feinberg Law if for any reason it is found to be invalid, which, of course, we maintain is not the case. The only requirement of the rule in question in respect to the operative provisions of the Feinberg Law is that the school authorities shall inquire as to an employee's membership in organizations listed by the Board of Regents as advocating the overthrow of the government by force and violence.

The rule could have been adopted if the Feinberg Law had never been enacted, concerning as it does the enforcement of Section 3021 of the Education Law and Section 12-a of the Civil Service Law, which had been on the books since 1917 and 1939, respectively (our main brief pp. 4-5). To be sure, the Feinberg Law directs the Board of Regents to adopt rules for the enforcement of these statutory provisions, but it was the obligation of the Board of Regents to enforce them before the enactment of the Feinberg Law. As the Memorandum of the Commissioner of Education, which accompanied the issuance of the rules, stated (R. 25):

"Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employees as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect simply of directing attention to a special supervisory need . . . which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need."

The rule requiring the reports thus does not depend upon the Feinberg Law.

It is another, a separate specific rule, Rule 2 (R. 23-4), which was adopted to carry out the operative provisions of the Feinberg Law as to the listing of organizations and the *prima facie* evidence provision prescribed by subdivision 2 of Section 3022 of the statute.

It is not seen how any intimidating effect of the rule in question, designed as it is to carry into effect (1) a pre-existing concededly valid statute and (2) a pre-existing clearly separable one, can be urged as a ground for striking down the operative provisions of the Feinberg Law. It has no relation to those operative provisions which provide only for the listing, after appropriate notice and hearing, of organizations advocating the forcible overthrow of the government, and that continued (present) membership in an organization so listed, with knowledge of such listing, shall be *prima facie* evidence of disqualification. The rule would consequently seem to have no possible bearing on the question of the constitutionality of the law.

The argument appellants make against the rule is that the mere existence of a requirement for a regular report upon teachers has an unfortunate effect upon their morale. As was pointed out in the *Garner* case (in Mr. Justice Clark's opinion, 341 U. S. at p. 720, and in Mr. Justice Frankfurter's opinion, *id.* at p. 725), inquiry may be made by a state or municipality of its employees as to such matters. The existence of a law permitting such inquiry, such as the laws involved in the *Garner*, *Gerende*, and *American Communications* cases, would appear to have a far greater intimidatory effect than the Feinberg Law, with or without the rule providing for the reports.

Any misgivings as to the effect of the requirement for the reports (a matter which appears to rest in the realm of speculation as to the manner in which the rule would be administered, and is therefore not before the Court at this time) must vanish in the admonishments contained in the Memorandum of the Commissioner of Education on the administration of the rules (*supra*, R. 25). As to the reports of school officials, the Commissioner's Memorandum calls to the attention of the officials who will make the reports that they "will face a two-fold duty," viz: to eliminate the proscribed employees, but also (R. 26) that "it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive." The Commissioner's Memorandum further directs the school authorities to select with great care the officials who are to be entrusted with this duty, and specifically, that in districts employing fewer than eight teachers it would be advantageous to designate one of the trustees as the official or officials to make the required reports and in districts where there is only one trustee that he or she will pre-

sumably make all the reports. The Memorandum goes on to instruct the designated officials to "of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence" (R. 26).

In subsequent portions of this Memorandum (R. 27-28) are contained more cautionary directions which should dissipate any fears on the part of teachers as to any restrictive effect of the rule or the law except to accomplish the purpose the Legislature intended.

As has been said, the oath statutes upheld in the *Garner*, *Gerende*, and *American Communications* cases, would appear to produce a far more intimidatory effect, for they require the taking of an oath that one is not a member of an organization advocating the forcible overthrow of the government as a condition of public employment or the right to hold public office or office in a labor union. In those cases there was no provision for a finding by an appropriate agency, after hearing, that the organization did in fact advocate the overthrow of the government by force. The person affected was required to make oath that he did not belong to any organization which so advocates, and necessarily was required to be much more cautious in respect to the organizations which he joined than is a person seeking employment in the public school system of our State. Under the *Feinberg Law*, the teacher need be concerned only with the listed organizations.

Anent persons who in their youth, in seeking an answer to the problems of the depression of the 1930's, embraced doctrines or joined organizations which they later abandoned in disillusionment, it is to be noted that the Feinberg Law gives full protection to such individuals by providing that it is present—not past—membership which disqualifies (opinion of Court of Appeals, 301 N. Y. at p. 494, R. 67). Insofar as inquiry might in a particular case be made as to a past affiliation, such affiliation could not, once severed, be *prima facie* evidence to be introduced against a teacher. The permitted evidence could be as to present membership only. The law *does* leave "room for a change of heart" (Mr. Justice Burton in *Garner v. Los Angeles Board*, 341 U. S. at p. 729).

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Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York.

WENDELL P. BROWN,
Solicitor General,

RUTH KESSLER TOCH,
Assistant Attorney General,
Of Counsel.